92-1488

No.

Supreme Court
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IN THE

Supreme Court of the United States

October Term, 1992

ROGER A. PETERSON,

Petitioner,

v.

R. H. STAFFORD,
the Washington County Auditor,

Respondent,

and

JOAN ANDERSON GROWE,
the Secretary of State,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Minnesota statute which provides ballot advantages to incumbent judicial candidates, as illustrated below, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, notwithstanding that the Minnesota Constitution requires fair elections for judicial positions.

JUDICIAL OFFICES

ASSOCIATE JUSTICE
SUPREME COURT
(GARDEBRING SEAT)
(Vote For One)

SANDRA GARDEBRING INCUMBENT

ROGER A. PETERSON

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ROGER A. PETERSON,

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R. H. STAFFORD, THE WASHINGTON COUNTY AUDITOR,

RESPONDENT,

and

JOAN ANDERSON GROWE, THE SECRETARY OF STATE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

The Petitioner, Roger A. Peterson, respectfully requests this Court to issue a Writ of Certiorari to review the judgment of the Supreme Court of the State of Minnesota entered in this action on December 1, 1992.

OPINIONS BELOW

The decision of the Supreme Court of the State of Minnesota holding that Minn. Stat. §204B.36, subd. 4, which prescribes that on the official ballot the judicial seats to be voted upon be designated as the "(last name of the incumbent) seat" and Minn. Stat. §204B.36, subd. 5, which mandates an incumbency designation on the ballot do not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution

is reported as *Roger A. Peterson v. R.H. Stafford, Washington County Auditor and Joan Anderson Growe, Secretary of State*, 490 N.W.2d 418 (Minn. 1992). This decision is reprinted in Pet. App. p. 18A.

JURISDICTION

In the initial proceeding in this matter, Petitioner filed his petition directly with the Minnesota Supreme Court (Pet. App. p.18A). The Minnesota Supreme Court has original jurisdiction in any case where an individual charges an error by the Secretary of State in the preparation of official election ballots. Minn. Stat. §204B.44 (1992). The oral judgment of the Supreme Court of Minnesota denying Mr. Peterson's petition was issued on September 23, 1992, the same day that the Court heard the oral arguments in the matter. A written opinion was issued October 9, 1992, and judgment was entered December 1, 1992.[1] Although the November, 1992 election has been held, the issues presented herein are not moot, because they are "capable of repetition, yet evading review." *Storer v. Brown*, 94 S.Ct. 1274, 1282 n.8 (1974) *citing Rosario v. Rockefeller*, 93 S.Ct. 1245, 1249 n.5 (1973); *Dunn v. Blumstein*, 92 S.Ct. 995, 998 n.2 (1972). As in *Storer*, although the election is long over "and no effective relief can be provided to the candidates or voters, ... this case is not moot, since the issues properly presented, and their effects on independent candidacies will persist as the ... statutes are applied in future elections." *Id.* at 1282 n.8. Additionally, Roger Peterson intends to run again for election to the Minnesota Supreme Court in the future, and therefore, will be

[1] 28 U.S.C. §2101(c) provides that "any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after entry of such judgment or decree." Under Minn. Civ. App. R. Rule 136.02 entry of judgment does not occur until at least 30 days after judgment is issued. *See also Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 99 S.Ct. 540, 545 n. 18 (1978).

once again subject to the same statutorily created disadvantage imposed on non-incumbent candidates.

The United States Supreme Court has jurisdiction to review the final judgment rendered by the Minnesota Supreme Court "where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution." 28 U.S.C. §1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Fourteenth Amendment.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minnesota Constitution, Article VI, §7.

> Term of office; election. The term of office of all judges shall be six years and until their successors are qualified. They shall be elected by the voters from the area which they are to serve in the manner provided by law.

Minnesota Statute §204B.35, subd. 2 (1992).

> **Manner of preparation.** Ballots shall be prepared in a manner that enables the voters to understand which questions are to be voted upon and the identity and number of candidates to be voted for in each office and to designate their choices easily and accurately. The name of a candidate *shall not appear on a ballot in any way that gives the candidate an advantage over an opponent, including words descriptive of the candidate's occupation, qualifications, principles, or opinions, except as otherwise provided by law* (emphasis added).

Minnesota Statute §204B.36, subd. 4 (1992).

> **Judicial candidates.** The official ballot shall contain the names of all candidates for each judicial office and shall state the number of those candidates for whom a voter may vote. The title of each judicial office shall be printed on the official primary and general election ballot as follows:
>
> (a) In the case of the supreme court:
> "Chief justice (or associate justice)—supreme court (last name of incumbent) seat";
>
> (b) In the case of the court of appeals:
> "Judge—court of appeals (last name of incumbent) seat";
>
> (c) In the case of the district court:
> "Judge—(number) district court (last name of incumbent) seat"; or
>
> (d) In the case of the county court:
> "Judge—(number) county court (last name of incumbent) seat."

Minnesota Statute §204B.36, subd. 5 (1992).

> **Designation of incumbent; judicial offices.** If a chief justice, associate justice, or judge is a candidate to succeed again, the word "incumbent" shall be printed after that judge's name as a candidate.

Minnesota Statute §204B.44 (1992).

> Any individual may file a petition in the manner provided in this section for the correction of any of the following errors, omissions or wrongful acts which have occurred or are about to occur:
>
> * * *
>
> (d) Any wrongful act, omission, or error of any election judge, municipal clerk, county auditor, canvassing board or any of its members, the secretary of state, or any other individual charged with any duty concerning an election.

> The petition shall describe the error, omission or wrongful act and the correction sought by the petitioner. The petition shall be filed with any judge of the supreme court in the case of an election for state or federal office . . . . The petitioner shall serve a copy of the petition on the officer, board or individual charged with the error, omission or wrongful act, and on any other party as required by the court. Upon receipt of the petition the court shall immediately set a time for a hearing on the matter and order the officer, board or individual charged with the error, omission or wrongful act to correct the error or wrongful act or perform the duty or show cause for not doing so. The court shall issue its findings and a final order for appropriate relief as soon as possible after the hearing. Failure to obey the order is contempt of court.

STATEMENT OF THE CASE

The Petitioner below, Mr. Peterson, filed his Petition on September 1, 1992, citing as error the statutory requirement that there appear on the official ballots for judicial elections the designation of "incumbent" after the name of a judicial candidate to succeed again and that the judicial seat to be voted upon be labelled as "Chief justice (or associate justice)—supreme court (last name of incumbent) seat", i.e. as in this race, "Associate Justice - Supreme Court (Gardebring Seat)."

The citizens of each state freely chose the method whereby their judges and justices would be selected and that particular method was incorporated into the various state constitutions. In states such as Minnesota, where the citizens ratified a constitution that requires the election of judges and justices, the State is constitutionally bound to conduct all elections in a free and impartial manner. Minnesota's statutorily mandated designations clearly grant an advantage to incumbent judicial candidates over their challengers. This statute denies equal protection of the law to all the non-incumbent candidates for judicial office and to all the citizens who cast votes for the non-incumbent candidates. It, therefore, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

The parties submitted written briefs on the state and federal constitutional issues involved and the Minnesota Supreme Court heard oral arguments on September 23, 1992. The Court issued an oral opinion denying Mr. Peterson's Petition on September 23, 1992, and a written opinion on October 9, 1992. The judgment of the court was entered December 1, 1992.

STATEMENT OF FACTS

Roger A. Peterson is a citizen of the State of Minnesota and has been licensed as an attorney in Minnesota since 1959. He is a resident and registered voter of Washington County, Minnesota.

At the time he filed for the position of associate justice of the Minnesota Supreme Court he met all of the requirements established for candidates to judicial office in Minnesota. "Judges of the supreme court and the district court shall be learned in the law." Minnesota Constitution, art. VI, §5. "Learned in the law" has been defined to mean that a candidate for the supreme court or district court be admitted or entitled to be admitted to practice as an attorney at law in this state. *In re Scarrella*, 221 N.W.2d 562, 563 (Minn. 1974). Mr. Peterson timely filed for the position of associate justice of the Minnesota Supreme Court on July 21, 1992. When he filed, he and all other candidates were required to file for a specific seat occupied by a specific justice pursuant to Minn. Stat. §204B.06, subd. 6 (1992). Mr. Peterson filed for the seat held by Justice Sandra Gardebring. No candidates other than Mr. Peterson and Justice Gardebring filed for that position, but other candidates filed to run against other specific justices.

On August 28, 1992, Mr. Peterson obtained his absentee ballot for the primary election from the Washington County Auditor's Office. There was no primary election for the seat which Mr. Peterson had filed for because only two candidates had filed for the particular position. The ballot listed two judicial seats on the State Supreme Court to be voted upon in the primary election. They appeared as follows:

JUDICIAL OFFICES

CHIEF JUSTICE
SUPREME COURT
(KEITH SEAT)
(VOTE FOR ONE)

ROSS A. PHELPS

MICHAEL C. DEMOSS

A.M. (SANDY) KEITH INCUMBENT

ASSOCIATE JUSTICE
SUPREME COURT
(YETKA SEAT)
(VOTE FOR ONE)

ALAN C. PAGE

EDWARD W. BEARSE

KEVIN JOHNSON

(App. p. 23A). The wording of the ballot conforms with the language prescribed by Minn. Stat. §204B.36, subds. 4 and 5 (1992).

In regards to the associate justice seat above designated (Yetka Seat) no incumbent was designated because Judge Yetka's attempt, pursuant to Minn. Stat. §490.124, subd. 2 (1990), to have his term extended to avoid the election was declared in violation of the Minnesota Constitution in a proceeding initiated by candidate, now justice, Alan C. Page, who argued to a specially appointed seven member court of all retired judges. The Court determined that it was necessary to "appoint and impanel neutral and disinterested members of the judiciary to serve as the Supreme Court by designation." Order of the Minnesota Supreme Court issued July 22, 1992, in *Page v. Carlson*, 488 N.W.2d 274 (Minn. 1992).

The statutory provisions apply to the general election ballots as well as primary election ballots. Mr. Peterson believed, therefore, that designations similar to those that appeared on the primary ballot would appear on the general election ballot when he would be a candidate for an associate justice position. He, therefore, filed a petition with the Minnesota Supreme Court requesting the Court, or a specially appointed court, review these provisions and rule upon their constitutionality.

Unlike the *Page* proceeding argued one month earlier, four members of the Minnesota Supreme Court and one retired judge, appointed by the four sitting justices, heard oral arguments on the Petition on September 23, 1992. Justice Yetka and the colleagues and peers of the three incumbent justices who were required to run for election sat in judgment on the issues presented herein. The court, in its opinion, explained the composition of the court.

> [T]he members of this court who have not exercised their right to recusal have concluded that it is not only appropriate, but necessary in fulfillment of our judicial responsibility to hear and decide this controversy. The circumstances relating to the term of office of each participating justice and the operation of Minn. Stat. §§490.121, subd. 12 and 490.125 (1990), the mandatory judicial retirement law, make certain the fact that not one member participating in this proceeding will ever stand again for judicial election in the State of Minnesota and that, accordingly, there can be neither the potential for nor the perception of a conflict of interest.

Peterson v. Stafford, 490 N.W.2d at 418 n. 1 (App. p. 3A).

The Court issued an oral opinion denying the Petition on September 23, 1992. The Minnesota Supreme Court's written opinion, issued October 9, 1992, includes a discussion of the historical development of Minnesota's judicial selection process. *Id.* at 420-423. The Court observed that the framers of

the constitution decided on the election process for the selection of all judges and justices. We observe that while the framers of the Minnesota Constitution were fully aware of the judicial selection alternatives including the appointment for life process followed in the federal justice system, they chose to adopt an election process to select judges and justices.

In years subsequent to the adoption of the judicial election procedure several committees suggested the amendment of Minnesota's judicial selection process. The first time suggestions were made to change the selection process occurred in 1948 when a special constitutional convention recommended extensive revisions to the judicial article of the state constitution to alter the fundamental election process. *Id.* at 420. In 1972, a constitutional study commission subcommittee recommended that the basic structure of the judiciary be changed and that a "Missouri plan"-type selection process be adopted by amending the Minnesota Constitution.[2] *Id.* at 422-423. On both occasions, twenty-four years apart, the legislature rejected the recommendations and the proposed amendments were never submitted to the voters of the state. Gwenyth Jones, *By the People? Judicial Selection in Minnesota*, The Bench and Bar of Minnesota, Feb. 1993, at 17. Consequently, all judges in the state are still elected pursuant to the provisions of the Minnesota Constitution. *Peterson v. Stafford*, 490 N.W.2d at 423. The court concluded from the historical development of Minnesota's judicial selection process that although no substantial amendments were made to the election process by the voters, changes were made by statute. *Id.* at 423-425.

---

[2]"The Missouri plan has been simply defined as follows: Under this plan, when a vacancy in a judicial office occurs, a non-partisan judicial commission submits the names to the governor who appoints one of them to fill the vacancy. After holding office for a limited period, the name of the appointee is submitted to the electorate without a competing candidate on the question: 'Shall Judge _____ be retained in office?' If a majority of the votes cast on the question are in the affirmative, the appointee remains in office for a new and full term. If the vote is in the negative, the process is repeated." *Peterson v. Stafford*, 490 N.W.2d at 422 n.17 (citation omitted).

The court asserts that these suggestions by legislative committees demonstrate their recognition of the tensions inherent in the judicial selection process prescribed by the state constitution. *Id.* at 422. The suggested constitutional amendments were never submitted to the voters by the state, rather the legislature "has provided its own variation of the election process." *Id.* at 423. This legislative variation involves permitting a judicial appointee at least one year in office before they are required to stand for election to that position. The additional time period was "to allow the public to reflect favorably or unfavorably on a judge's competence in office." *Id.* at 423. Additionally, when the incumbent judge's position is finally placed on the ballot to be voted upon, he is designated as an incumbent. *Id.* at 423. (This incumbency designation provision appears to assume that although the public has had at least a year to evaluate the performance of a judge, they still need assistance in identifying the judge they were to be evaluating.)

The court applied the rational basis test analysis to the ballot designation provisions. *Id.* at 423. The court, recognized that such designations "may provide the incumbent with an advantage over other candidates", but stressed that their purpose was "informational". *Id.* at 423.

The court, in its only reference to the designation of the seat to be voted upon as the incumbent's seat, stated that "[a] logical extension and application of the 'separate seat' concept of a judicial office is that the legislature is authorized to select a manner of identification of that seat which promotes and clarifies the distinction between the separate offices." *Id.* at 424. The court permits this designation as constitutionally acceptable despite the fact that each position to be voted upon is already separately listed as "Associate Justice" or "Chief Justice" and that only the candidates who filed for that particular position are listed under

the position heading. Mr. Peterson asserts that these two ballot format provisions are all that is necessary to allow the voter to determine for what position she is voting.

The court, in upholding the designation stated:

> Whatever advantage there may be to the incumbent from the incumbency designation on the ballot, it is clear that the overriding purpose of the ballot designation has been to assure an able, independent and stable judiciary while at the same time requiring incumbent judges to submit to voter appraisal in an open election.

Id. at 424.

The court concluded that:

> Minnesota has adopted its own middle-of-the-road approach to judicial selection. The open election process has been retained, but with a *quasi-retention feature* which simply informs the voter, without comment, who is the incumbent candidate whose performance is under review and who is the non-incumbent challenger (emphasis added).

Id. at 425. The so-called "quasi-retention feature" is embodied in the legislation which provides a two-step process of designations on the election ballots: First, Minn. Stat. §204B.36, subd. 4, adopted in 1973, provides that the title of the judicial office to be voted upon be listed as the incumbent's seat (i.e. "Gardebring Seat"); Second, Minn. Stat. §204B.36, subd. 5, passed in 1949, requires that the candidate to succeed again be labelled the "incumbent". Mr. Peterson, in his position as both a registered voter and a qualified candidate for judicial office, challenged these designations as violative of the Minnesota Constitution and of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

The Minnesota Supreme Court denied Mr. Peterson's Petition.

This appeal followed.

REASONS FOR GRANTING THE WRIT

1. The decision of the Minnesota Supreme Court is in error because it permits the State to interfere with the electorates' fundamental constitutional right to vote and the corresponding rights to cast their votes unimpeded by state influence for the candidate of their choice. This practice violates the Equal Protection Clause of the Fourteenth Amendment.

2. The decision of the Minnesota Supreme Court is in error because it permits the State to continue to use a ballot format that enables the State to provide advantages to incumbent judges challenged by non-incumbent candidates. This ballot format violates the Equal Protection Clause of the Fourteenth Amendment.

3. There exists a conflict between various state and federal courts regarding the constitutionality of incumbency designations on election ballots. The Minnesota Supreme Court's decision to uphold a statute that is, in effect, an "incumbent first" statute is in conflict with numerous other state and federal court decisions.

The decision of the Minnesota Supreme Court permits the continued violation of the fundamental right of all voting Minnesotans to cast their votes without state influence and also permits the continued denial of equal protection to all non-incumbent judicial candidates in the State of Minnesota. The Court should grant this Petition to end the violation of the Equal Protection Clause of the Fourteenth Amendment and to resolve the conflict among the circuits by declaring such "voting cues" to violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

I.

THE DECISION OF THE MINNESOTA SUPREME COURT UPHELD A STATE STATUTE THAT IMPAIRS THE FUNDAMENTAL RIGHT TO VOTE AND VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. The Right To Vote Is A Fundamental Right Protected From Unconstitutional State Infringement By The Equal Protection Clause Of The Fourteenth Amendment.

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a *free and unimpaired manner* is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. (Emphasis added.)

Harper v. Virginia State Board of Election, 86 S.Ct. 1079, 1982 (1966) *quoting Reynolds v. Sims*, 84 S.Ct. 1362, 1381 (1964); *see also Lubin v. Panish*, 94 S.Ct. 1315, 1322 (1974); *Yick Wo v. Hopkins*, 6 S.Ct. 1064, 1071 (1886). "[T]he right to vote in federal elections is conferred by Art. I, §2 of the Constitution, . . . the right to vote in state elections is nowhere expressly mentioned. It is argued that the right to vote in state elections is implicit, particularly by reason of the First Amendment . . . ." *Id.* at 1080 (citation omitted). "While it is true that the administration of the electoral process is a matter that the Constitution largely entrusts to the states, Art. I, §2, Art. II, §1, in exercising their powers of supervision over elections 'the state may not infringe upon basic constitutional protections', and 'unduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments.'" *Riddell v. National Democratic Party*, 508 F.2d 770, 776-777 (5th Cir. 1975) *quoting Kusper v. Pontikes*, 94 S.Ct. 303, 307 (1973). Clearly, the state's power to legislate and reg-

ulate election practices for state as well as federal offices must be exercised within the boundaries of the federal constitution.

The Minnesota state legislature has considerable discretion in organizing and supervising state elections. However, the state must ensure that it exercises its power consistent with the Equal Protection Clause of the Fourteenth Amendment. In the current matter, the Minnesota Supreme Court has upheld a statute that permits the State to influence the outcome of judicial elections by providing "voting cues" which favor incumbent candidates. Such "voting cues" influence the outcome of elections and prevent all qualified voters from exercising their franchise in "a free and unimpaired manner."

B. The Right To Vote And The Right To Be A Candidate Are Inexorably Connected.

The issues presented in this case are difficult to classify. The state statute specifying ballot format does not involve absolute exclusion of a particular candidate, however, the manipulation of the information provided on the ballot has an effect on the fundamental right to vote. *McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980). The states' legitimate interest in regulating ballot format

> must be achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. *The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters*.

Lubin v. Panish, 94 S.Ct. at 1320 (1974) (emphasis added).

The rights of voters and the rights of candidates are not easily separated. *Bullock v. Carter*, 92 S.Ct. 849, 856 (1972). "[A]ny restrictions on ballot access by candidates necessarily burdens

the rights of their supporters to some extent." *Rosen v. Brown*, 970 F.2d 169, 175-176 (6th Cir. 1992), *citing Cromer v. State of South Carolina*, 917 F.2d 819, 822 (4th Cir. 1990).

The intertwined rights of voters and candidates are related to the right of the voters to be allowed the opportunity to "cast their votes effectively." *Williams v. Rhodes*, 89 S.Ct. 5, 10 (1968). The First Amendment protects the right to cast a meaningful vote for a candidate of one's choice. *Rosen v. Brown*, 970 F.2d at 176, *citing Dart v. Brown*, 717 F.2d 1491, 1504 (5th Cir. 1983) *cert. denied*, 469 U.S. 825 (1984). This right, however, is infringed upon when the state provides "voting cues" on ballots favoring one candidate over others and making it virtually impossible for a non-favored candidate to prevail in an election. *Rosen v. Brown*, 970 F.2d at 176.

The facts in *Rosen v. Brown* bear a striking resemblance to the facts in the current matter. Rosen was an independent candidate for a seat in the Ohio House of Representatives. He secured a place on the ballot, but the State refused to designate him as an Independent on the ballot, despite the fact that candidates nominated by a political party were designated as that party's candidate. *Id.* at 174. The court found that the State provided a "voting cue" to those who wanted to vote for a Democratic or Republican candidate thus providing an advantage to party candidates. *Id.* at 176.

In ascertaining whether the election laws violated the federal constitution the court applied the test set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 1570 (1983). The court determined that the state election code burdened the First Amendment rights of voters to cast their votes effectively and that the statute violated the Equal Protection Clause of the Fourteenth Amendment "because it places unequal burdens on Independent and third party candidates and is designed to give Democrats and Republicans a decided advantage at the polls in a general election." *Id.* at 177-178.

Similarly, Minnesota's legislature has provided three voting cues in judicial elections; the designation of the position to be voted upon as the incumbent's seat by using the incumbent's surname (i.e., Gardebring Seat) and always placing that seat identification on top of the list of candidates, and third, the printing of the incumbency designation beside the name of the candidate to succeed again. These voting cues provide advantages to incumbents that are virtually impossible for the challenging non-incumbent candidate to overcome. The statute must, therefore, be found to violate the Fourteenth Amendment.

C. The Minnesota Supreme Court Erred When It Applied The Rational Basis Test In Its Analysis Of The Incumbency Designations.

In its analysis of the judicial election provisions, the Minnesota Supreme Court used a standard of review that is "something akin to the rational basis test." *Peterson v. Stafford*, 490 N.W.2d at 423. The court erred.

An equal protection challenge to a statute charged with directly affecting the electoral process, the fundamental nature of the right to vote, and the importance of preserving the integrity of the franchise necessarily raises the level of judicial scrutiny. *Gould v. Grubb*, 536 P.2d 1337, 1342 (Calif. 1975). Where a "classification scheme imposes a very 'real and appreciable impact' on the equality, fairness and integrity of the electoral process, that scheme is subject to strict judicial scrutiny." Id. at 1342-1344, *citing Bullock v. Carter*, 405 U.S. at 143. Under this standard, the statute can be upheld only if the state can "demonstrate that the classifications drawn are *necessary* to achieve a *compelling* government interest." *Id.* at 1344.

In the alternative, the court could have applied the test set forth by this Court in *Anderson v. Celebrezze*, 103 S.Ct. at 1570. It is an analytical process for making such "hard judgments" in the context of a challenge to a provision of a state's election laws.

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id. at 1570.

Under either the strict scrutiny test or the *Anderson* balancing test, the challenged judicial election statute fails to pass constitutional muster[3]. The statute burdens the First Amendment rights of those voters who work to effectively vote for the non-incumbent candidate. The statute also violates the Equal Protection Clause of the Fourteenth Amendment because it places an unequal burden on non-incumbent candidates and is designed to give incumbents an advantage. When these concerns are balanced with the state's justification that the statute provides information to the voters, the provisions are clearly unconstitutional, under any level of scrutiny, and must be declared invalid.

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[3]In *McLain v. Meier*, 637 F.2d at 1167, the court stated that it was unclear as to which standard to apply. The court found, however, that an "incumbent first" statute (which is similar to Minnesota's designation of the seat as the "incumbent seat") fails to withstand even the minimal requirements of the rational basis test, because the justification was unsound.

II.

THE DECISION OF THE MINNESOTA SUPREME COURT UPHELD A STATE STATUTE THAT ENABLES THE STATE TO PROVIDE ADVANTAGES TO INCUMBENT CANDIDATES OVER ALL OTHER CANDIDATES IN VIOLATION OF THE MINNESOTA CONSTITUTION AND IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. States Are Empowered To Regulate Elections, However States May Not Impinge Upon Constitutional Rights.

The source of the infringement of the electorates' right to cast their votes unimpeded is the ballot format for judicial offices prescribed in Minn. Stat. §204B.36. This statute requires that the judicial seat to be voted upon be labelled the incumbent's seat and that the designation appear directly under the position to be voted upon, and that a candidate to succeed herself be designated as an "incumbent". "An election ballot is a State-devised form through which candidates and voters are required to express themselves at the climactic moment of choice." *Rosen v. Brown*, 970 F.2d at 175; *see also Bachrach v. Secretary of Commonwealth*, 382 Mass. 268, 415 N.E.2d 832, 834 (1981) *citing Anderson v. Martin*, 84 S.Ct. 454, 455 (1964). Therefore, when the state designs the format of the ballot it must ensure that it does not violate any constitutional guaranties. *Id.* at 175, *citing Bachrach v. Secretary of Commonwealth*, 415 N.E.2d at 834-35. "The unequal effect flowing from [a] ballot design gives rise to the equal protection question whether the inequality is such as offends the fourteenth amendment." *McLain v. Meier*, 637 F.2d at 1167.

This Court has addressed various equal protection challenges to restrictions which states have attempted to impose on the fundamental right to vote and ballot access: *Anderson v. Celebrezze*, 103 S.Ct. 1564 (1983) (holding early filing date for independent presidential candidates to be an unconstitutional

burden on voting and associational rights of independent candidates' supporters); *Illinois State Bd. of Election v. Socialist Workers*, 99 S.Ct. 983 (1979) (declaring unconstitutional a state requirement that independent candidates and new political parties obtain signatures of large numbers of qualified voters in order to appear on ballot); *Lubin v. Panish*, 94 S.Ct. 1315 (1974) (held that California filing fee requirement unconstitutionally denied indigent candidates access to the ballot); *Storer v. Brown*, 94 S.Ct. 1274 (1974) (finding state statute forbidding ballot position to independent candidates who have registered affiliation with a qualified political party at anytime within one year prior to primary election to be constitutional); *American Party of Texas v. White*, 94 S.Ct. 1296 (1974) (declaring unconstitutional the Texas state practice of printing on absentee ballots only the names of the two major party candidates); *Bullock v. Carter*, 92 S.Ct. 849 (1972) (Court declared primary election filing fee to be unconstitutional); *Williams v. Rhodes*, 89 S.Ct. 5 (1968) (holding that election law making it virtually impossible for new political party to be placed on the ballot results in a denial of equal protection of the laws); *Harper v. Virginia State Bd. of Elections*, 86 S.Ct. 1079 (1966) (holding that Virginia's poll tax was unconstitutional and inconsistent with the Equal Protection Clause); *Anderson v. Martin*, 84 S.Ct. 454 (1964) (Court held that compulsory designation of candidate's race on the ballot violated the Fourteenth Amendment). It is clear from analysis of the above cited cases that

> administration of the electoral process is a matter that the Constitution largely entrusts to the States. But, in exercising their power of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections.... As the Court made clear in *Williams v. Rhodes, supra*, unduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments.

Kusper v. Pontikes, 94 S.Ct. at 307-308 (1973) (citations omitted).

B. When A State Constitution Provides That A Position Is To Be Elective, That Provision Must Be Given Effect By Ensuring Free And Equal Elections.

Minnesota's Constitution requires that judges and justices be elected.

> The term of office of all judges shall be six years and until their successors are qualified. They shall be elected by the voters from the area which they are to serve in the manner provided by law.

Minn. Const., Art. VI, §7.

Art. VI, §7 clearly states that judges "shall be elected by the voters . . . ." Elections may be broadly defined as an expression of a choice by the body of electors. *Black's Law Dictionary*, 608 (4th ed. 1968). It is an underlying principle of constitutional law that "every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates . . . ." *Gray v. Sanders*, 83 S.Ct. 801, 808 (1963). "The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." Id. In addition to the voter's right to a free and equal election, all candidates to elected positions have a "federally protected right to application and enforcement of the state law without intentional or purposeful discrimination among them." *Weisberg v. Powell*, 417 F.2d 388, 392 (7th Cir. 1969) *citing Snowden v. Hughes*, 321 U.S. 1 (1944); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

A ballot format, such as Minnesota's, "imposes a very 'real and appreciable impact' on the equality, fairness and integrity of the electoral process." *Gould v. Grubb*, 536 P.2d at 1343, *quoting Bullock v. Carter*, 405 U.S. at 143. The incumbency designations act as voting cues that provide advantages to one group of candidates, the incumbents, and dilute the weight of the votes of all the electors who cast their votes for non-incumbents. *Id.*;

see also McLain v. Meier, 637 F.2d at 1166; Scott, *California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents*, 45 So.Cal.L. Rev. 365, 383-386 (1972); footnote 6, *infra*.

The state legislature, by statutorily providing advantages to judicial incumbents who are required to stand for election by the state constitution, has violated the basic federal constitutional principle that the votes of all qualified electors be equal. The state legislature has created provisions that deny the voters of Minnesota their constitutionally guaranteed right to free and equal elections, thereby violating the Equal Protection Clause of the Fourteenth Amendment.

As has been previously discussed, a state has the right to regulate elections. The power to regulate elections is, however, limited by both the federal constitution and the particular state constitutional provisions. Minnesota's constitution states that judges shall be elected "in the manner provided by law." This clause, however, does not authorize the legislature to provide advantages to incumbent judicial candidates. Petitioner submits that the phrase is limited to laws relative to the conduct of the election in an administrative or procedural sense, and does not authorize the legislature to make substantive changes to a free and unimpaired election process. If the phrase is interpreted to allow the legislature to make substantive statutory changes to the election process, then the legislature could also prescribe, for example, that only incumbents may run, or that only those over 50 years of age may run, or that only those who have been residents of Minnesota for ten years may run. We conclude from these extreme examples, that the proper interpretation of "in the manner provided by law" is limited in scope. The clause relates to defining the judicial districts, the number of judges, the date of elections and the type of ballots, such as written ballots or voting machines ballots, rules regarding absentee voting and other ministerial aspects of the election process.

This interpretation is further supported by the cannons of statutory construction which are also applicable to constitutional interpretation. *Badger v. Hoidale*, 88 F.2d 208 (8th Cir. 1937). One canon of statutory construction states that "[t]he legislature does not intend a result that is absurd, impossible of execution, or unreasonable." Minn. Stat. §645.17(1)(1947). Certainly, if the constitutional clause is interpreted to permit the state legislature to substantively modify the election process without limitation, it is conceivable that the legislature might eliminate elections of judges altogether.

The election process for judges as it currently exists, as statutorily modified, bears little resemblance to elections as they are conducted in most democratic systems and denies free and equal elections to the voters of Minnesota. The Minnesota legislature started down a "slippery slope" when it passed the statute that requires the judicial seat to be voted upon be designated as the incumbent's seat and that the incumbent be so designated on the ballot. If this statute is permitted to stand, it is likely this state will continue its efforts to legislatively change Minnesota's constitution, without submitting the changes to the electors of the State as is required when proposing constitutional amendments. Minn. Const., Art. IX, §1. And, furthermore, the changes may violate the Fourteenth Amendment more severely.

C. Minnesota Law Violates The Equal Protection Clause Of The Fourteenth Amendment By Requiring That A Judicial Incumbent's Name Always Appear At The Top Of The List Of Candidates. The Court's Decision To Uphold This Statute Is In Conflict With Numerous Other Decisions.

State legislatures clearly have considerable discretion in "formulating election procedures and devising regulations for the form and content of ballots." *Gould v. Grubb*, 536 P.2d at 1342; see also, *Sangmeister v. Woodard*, 565 F.2d 460, 465 (7th Cir.

1977); *Kautenberger v. Jackson*, 333 P.2d 293, 294 (Ariz. 1958). The Minnesota state legislature, however, stepped beyond the realm of constitutionally acceptable ballot formats when it passed Minn. Stat. §204B.36, subds. 4 and 5.

Minn. Stat. §204B.36, subd. 4 (1992) provides that the judicial position to be voted upon be listed as the incumbent's seat. Under current state practice, the ballot appeared in the November 1992 election as follows, in part:

ASSOCIATE JUSTICE
SUPREME COURT
(GARDEBRING SEAT)
(VOTE FOR ONE)

SANDRA GARDEBRING INCUMBENT

ROGER A. PETERSON

The designation of the position as "Gardebring Seat" creates the appearance that the position belongs to Justice Gardebring. This designation plants in the minds of the voters an association between the position to be voted upon and the name of the incumbent justice. The State, by requiring the designation, indicates to the voters that this is the incumbent's seat and implies that it should remain so.

An equally important consequence of requiring this format on the ballots is that the incumbent's name will always appear at the top of the list of candidates, despite the statutory requirement that the names of the candidates be rotated within the list.[4] Additionally, this format guarantees that the incumbent's name will always appear twice on the ballot (if the justice is running

[4]Minn. Stat. §204D.08, subd. 3 (1992).

for re-election). The "incumbent first" format for ballots has been invalidated in numerous states.[5]

First place position on the ballot provides an advantage to the candidate placed there, which violates the Equal Protection Clause of the Fourteenth Amendment.[6] The Eighth Circuit recognized this when it stated that "incumbent first" statutes are unconstitutional, furthermore, that "[t]he effect of ballot placement on voting is a matter of fact." *McLain v. Meier*, 637 F.2d at 1166.

In *McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980), the court invalidated as violative of the federal constitution, an "incumbent first" statute. The North Dakota law reserved the first column on the ballot for the party that had received the most votes in the last congressional election. *Id.* at 1165-1166. The state had justified the placement as a method for "making the ballot as convenient and intelligible as possible for the great majority of voters." *Id.* at 1167.

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[5]The court in *McLain v. Meier*, 637 F.2d at 1167 (8th Cir. 1980) listed cases in which courts have held "incumbent first" statutes to be unconstitutional. *Netsch v. Lewis*, 344 F.Supp. 1280 (N.D. Ill. 1972); *Gould v. Grubb*, 537 P.2d 1337; *Holtzman v. Power*, 313 N.Y.S. 2d 904, 62 Misc. 2d 1029 (1970); *see also Sangmeister v. Woodard*, 565 F.2d 460 (placing Republicans first is unconstitutional); *Weisberg v. Powell*, 417 F.2d 388 (intentional manipulation of ballot placement by Secretary of State so as to give certain candidates first placement is unconstitutional); *Culliton v. Bd. of Election Comm'rs*, 419 F. Supp. 126 (placing Republicans first is unconstitutional); *Mann v. Powell*, 333 F.Supp. 1261 (N.D. Ill. 1969) (unconstitutional to break ties for ballot position so as to favor incumbent); *Kautenberger v. Jackson*, 85 Ariz. 128, 333 P.2d 293 (alphabetical listing is unconstitutional).

[6]The effect of ballot positioning has been recognized in numerous cases and law journal articles. The following articles conclude that the candidate occupying the top position on a ballot is the recipient of a significant number of votes from the "capricious or indifferent" electors. Kelman, *Ballot Designations: A Second Look*, 35 Wayne L. Rev. 63 (1988); Scott, *California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents*, 45 So. Cal. L. Rev. 365 (1972); H. Bain & D. Hecock, *Ballot Position and the Voter's Choice* (1957). The following cases have found a ballot advantage to the candidate listed in the first position. *Weisberg v. Powell*, 417 F.2d 388, 392-93 (7th Cir. 1969); *Culliton v. Bd. of Election Comm'rs. of the County of Du Page*, 419 F.Supp. 126 (N.D. Ill. 1976), *aff'd in part and remanded in part sub. nom. Sangmeister v. Woodard*, 565 F.2d 460 (7th Cir. 1977), *cert. denied, and app. dismissed sub. nom. Illinois State Bd. of Elections v. Sangmeister*, 435 U.S. 39, 98 S.Ct. 1516, 55 L.Ed.2d 535 (1978); *Gould v. Grubb*, 14 Cal.3d 661, 122 Cal. Rptr. 377, 536 P.2d 1337 (1975); *Holtzman v. Power*, 313

The court stated that it was not clear what standard of review to apply to the "incumbent first" statute. The court found, however, that the statute could not withstand even the minimal standard of review because the state's justification was unsound. *Id.* "[The state's] justification virtually admits that the state has chosen to serve the convenience of those voters who support incumbent and major party candidates at the expense of other voters." *Id.* The court found the procedure of listing the incumbent first to be "constitutionally unsound." *Id.*

Gould v. Grubb, 122 Cal. Rptr. 377, 536 P.2d 1337 (Calif. 1975) involved the constitutionality of a charter provision that automatically placed an incumbent in the top position on the ballot. The court found that placement at the top of the list provided the incumbent with an unconstitutional advantage over non-incumbents.

> Indeed, in a close race it is quite possible that a candidate with fewer "conscious" supporters than an opponent will actually win an election simply because his high position on the ballot affords him the advantage of receiving the vote of unconcerned or uninformed voters. *In such an instance, the challenged provision effectively undermines the fundamental democratic election tenant of majority rule.*

Id. at 1343, (citations omitted) (emphasis added). The court does state, in dicta, that a possible alternative to placing the incumbents in the top position is to allow them to designate themselves as incumbents on the ballot if non-incumbents were allowed a similar opportunity as to their occupation. The court stated that a statute that permitted incumbent *and* non-incumbent candidates to list their current occupation, position or other designations on the ballot might well be constitutional. *Id.* at 1343.

N.Y.S.2d 904, 62 Misc.2d 1020, *aff'd mem.* 34 App. Div.2d 917, 311 N.Y.S.2d 824, *aff'd mem.*, 27 N.Y.2d 628, 313 N.Y.S.2d 760, 261 N.E.2d 666 (1970); *Kautenberger v. Jackson*, 85 Az. 128, 333 P.2d 293 (1958); *Elliot v. Secretary of State*, 295 Mich. 245, 294 N.W. 171 (1940). (Cases cited in *McLain v. Meier*, 637 F.2d at 1166-1167).

While the Minnesota legislature has attempted to avoid the appearance of favoring judicial incumbents by requiring that the names of all candidates be rotated upon the ballot, the legislature has ensured that the incumbent's name will always appear first by providing that the position to be voted upon be designated as the incumbent's seat. Minn. Stat. §204B.36, subd. 4. Thus, the incumbent always receives "top billing" and those voters uncertain of whom to vote for merely have to mark their ballots for the candidate whose name matches the name that appears at the top of the list. It is important to note that only judicial incumbents receive these special designations. *No other elected officials in Minnesota are granted the advantage of having the seat they hold designated as their seat on the ballot, nor are they designated as an incumbent on the ballot.* These statutes evidence the legislature's unconstitutional intent to favor judicial incumbents over all other candidates. Furthermore, we submit that the designation of the position as the incumbent's seat, i.e. "(Gardebring Seat)" after the designation of the judicial position to be voted upon does nothing to eliminate any voter confusion, and by virtue of its position is equally as violative of the Constitution as are the "incumbency first" cases.

This Court should grant review of Minnesota's Supreme Court decision because it upholds a statute similar to an "incumbent first" statute that is clearly at odds with decisions of the numerous state and federal courts cited in this section.

D. Minnesota Law Providing Incumbency Designation For Judicial Candidates Violates The Equal Protection Clause Of The Fourteenth Amendment.

Certainly if favoring incumbents by placing them in the first place position on the ballot is unconstitutional, *a fortiori*, the specific designation of "incumbent" is invalid. This Court's only decision on incumbency designation occurred in its summary disposition of *Binkowski v. Miller*, 411 U.S. 901 (1973)[7],

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[7] See discussion of *Binkowski v. Miller* in Kelman, *Ballot Designations: A Second Look*, 35 Wayne L. Rev. 63, 68-71 (1988).

in which the Court merely affirmed the judgment of the lower court permitting incumbent judges to be designated as such upon the ballots. The precedential value of such a summary disposition "extends no further than 'the precise issues presented and necessarily decided by those actions.' A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain judgment." *Anderson v. Celebrezze*, 103 S.Ct. at 1568 n.5 (citations omitted). *Binkowski* has no precedential value in regards to the matter currently before the Court. The incumbency designation at issue in *Binkowski* was specifically permitted by the Michigan Constitution. Mich. Const. Art. VI, §24. The Minnesota Constitution, however, makes no such provision, it states in relevant part, "[all judges] shall be elected by the voters from the area which they are to serve in the manner provided by law." Minn. Const. Art. VI, §7.

Other courts have found incumbency designations to violate the Fourteenth Amendment. In *Rees v. Layton*, 6 C.A.3d 815, 86 Cal. Rptr. 268 (Cal. Ct. App. 1970), the court analyzed a Los Angeles Election Code that forbade any candidate, except an incumbent, from having any designation after his name on the ballot. The court concluded that the ordinance gave "an unfair advantage to incumbents over non-incumbents [and] that there is no rational basis whatsoever for the ordinance. It was an invidious requirement violative of . . . the fourteenth amendment of the federal Constitution . . . . " *Id.* at 823. The California court's decision is clearly in conflict with the Minnesota Supreme Court's decision to uphold as constitutional a similar incumbency designation statute, therefore, this Court should grant the Petition to review that decision.

The history of Minnesota's Constitution includes numerous occasions where it was suggested that the constitution be amended to permit an alternative method of choosing judges and justices. *See Peterson v. Stafford*, 490 N.W.2d at 420-423

(Minn. 1992). However, the method for electing judges prescribed in the constitution was never substantially amended, except for changing the numbers of years in a judicial term. The constitution still requires that judges and justices be elected. The legislature, however, adopted Minn. Stat. §204B.36, subds. 4 and 5, in an attempt to bypass the constitution and provide incumbent judges and justices with an advantage over all other candidates. The legislature has, in effect, amended Minnesota's Constitution without submitting the amendment to the electorate. This is impermissible and, therefore, the resulting designations are violative of the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution.

CONCLUSION

To resolve whether a state statute that provides voting cues which create ballot advantages for incumbent judicial candidates violates the Equal Protection Clause of the Fourteenth Amendment of the United States as has been held by other circuit and state courts, this Court should grant the Petition and reverse the error of the Minnesota Supreme Court.

Respectfully Submitted,
March 1, 1993

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ROGER A. PETERSON, Petitioner,

v.

R.H. STAFFORD, Washington County Auditor, Joan Anderson Growe, Secretary of State, Respondents.

No. C6-92-1658.

Supreme Court of Minnesota.

Oct. 9, 1992.

Candidate for judicial office filed petition challenging constitutionality of statutes governing judicial elections. The Supreme Court, en banc, Yetka, J., held that, under rational basis test, statute prescribing form of ballot used in judicial elections and statute mandating "incumbency" designation on ballot do not violate equal protection clauses of State or Federal Constitutions.

Petition denied.

Constitutional Law—225.2(6)
Judges - 3

Under rational basis test, statute prescribing form of ballot used in judicial elections and statute mandating "incumbency" designation on ballot do not violate equal protection clauses of State or Federal Constitutions, despite claim that statutes operate individually and in concert to create unfair advantage for judicial incumbent; statutes are justified by legitimate considerations of assuring able, independent and stable judiciary while at same time requiring incumbent judges to submit to voter appraisal in open election. M.S.A. §204B.36, subds. 4, 5; M.S.A. Const. Art. 1, § 2; U.S.C.A Const.Amend. 14.

SYLLABUS BY THE COURT

Minn. Stat. §204B.36, subd. 4, (1990), prescribing the form of the ballot used in judicial elections, and Minn. Stat. §204B.36, subd. 5 (1990), mandating the "incumbency" designation on the ballot, do not violate the equal protection clause of the fourteenth amendment of the United States Constitution or Minn. Const. art. 1, §2. *Gustafson v. Holm*, 232 Minn. 118, 44 N.W.2d 443 (1950), reaffirmed.

Roger A. Peterson, Therese M. Dosch, Minneapolis, for petitioner.

Jocelyn F. Olson, Asst. Atty. Gen., St. Paul, for Secretary of State.

Richard D. Hodsdon, Washington County Atty.'s Office, Stillwater, for Washington County Auditor.

John E. Grzybek, St. Paul, Minnesota.

Deborah Gilman, Civil Liberties Union, Minneapolis, for amicus curiae Minnesota Civil Liberties Union.

Heard, considered and decided by the court en banc.

YETKA, Justice.

On September 1, 1992, Roger A. Peterson, a candidate for the office of Associate Justice of the Minnesota Supreme Court, filed a petition pursuant to Minn. Stat. §204B.44 (1990) invoking the original jurisdiction of the supreme court[1] and seeking a judicial declaration of the unconstitutionality of Minn. Stat. §204B.36, subds. 4, 5 (1990). This opinion confirms the order filed on September 23, 1992 denying the petition.

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[1]The Honorable Harold W. Schultz, Retired Judge of the District Court, appointed as acting Associate Justice pursuant to Minn. Const. art. 6, §§ 2 and 10, and Minn. Stat. §2.724, subds. 1, 2 (1990), and the members of this court who have not exercised their right of recusal have concluded that it is not only appropriate, but necessary in fulfillment of our judicial responsibility to hear and decide this controversy. The circumstances relating to the term of office of each participating justice and the operation of Minn. Stat. §§ 490.121, subd. 12 and 490.125 (1990), the mandatory judicial retirement law, make certain the fact that not one member participating in this proceeding will ever stand again for judicial election in the State of Minnesota and that, accordingly, there can be neither the potential for nor the perception of a conflict of interest.

On July 15, 1992, petitioner filed an affidavit of candidacy, identifying the office of associate justice now held by Associate Justice Sandra S. Gardebring as the particular office for which he is a candidate. Minn. Stat. §204B.06, subd. 6 (1990).[2] The *gravamen of this petition, filed 48 days later,* is that the form of the ballot used in judicial elections, as defined by Minn. Stat. §204B.36, subd. 4,[3] and the incumbency designation mandated by Minn. Stat. §204B.36, subd. 5,[4] operate individually and in concert to create an unfair advantage for the judicial incumbent. This advantage, petitioner contends, is not only inconsistent with the letter and spirit of Minn. Stat. §204B.35, subd. 2,[5] but

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[2] Minn. Stat. §204B.06, subd. 6 provides in pertinent part:

> An individual who files as a candidate for the office of associate justice of the supreme court, *** shall state in the affidavit of candidacy the office of the particular justice or judge for which the individual is a candidate. The individual shall be a candidate only for the office identified in the affidavit. Each justice of the supreme court *** is deemed to hold a separate nonpartisan office.

[3] Minn. Stat. §204B.36, subd. 4 provides as follows:

> The official ballot shall contain the names of all candidates for each judicial office and shall state the number of those candidates for whom a voter may vote. The title of each judicial office shall be printed on the official primary and general election ballot as follows:
>
> (a) In the case of the supreme court: "Chief justice (or associate justice) - supreme court (last name of incumbent) seat";
>
> (b) In the case of the court of appeals: "Judge - court of appeals (last name of incumbent) seat";
>
> (c) In the case of the district court: "Judge - (number) district court (last name of incumbent) seat"; or
>
> (d) In the case of the county court: "Judge - (number) county court (last name of incumbent) seat."

[4] Minn. Stat. §204B.36, subd. 5 provides as follows:

> If a chief justice, associate justice, or judge is a candidate to succeed again, the word "incumbent" shall be printed after that judge's name as a candidate.

[5] Minn. Stat. §204B.35, subd. 2 provides as follows:

> Ballots shall be prepared in a manner that enables the voters to understand which questions are to be voted upon and the identity and number of candidates to be voted for in each office and to designate their choices easily and accurately. The name of a candidate shall not appear on a ballot in any way that gives the candidate an advantage over an opponent, including words descriptive of the candidate's occupation, qualifications, principles, or opinions, except as otherwise provided by law.

also is violative of the equal protection clause of the fourteenth amendment of the United States Constitution and Minn. Const. art. 1, §2.[6]

The petitioner's challenge is to the essence of the traditional judicial election process and, while he is now a candidate for judicial office, the claims asserted have no specific relation to his candidacy. In that context and upon a contention by the respondent secretary of state, we first address the timeliness of the petition.

The very nature of matters implicating election laws and proceedings routinely requires expeditious consideration and disposition by the courts facing considerable time constraints imposed by the ballot preparation and distribution process. As a result, we have examined applications for relief not only on their merits, but also from the perspective of whether the applicant acted promptly in initiating proceedings. *See Mattson v. McKenna*, 301 Minn. 103, 222 N.W.2d 273 (1974).[7]

The petitioner claims to have been unaware of the fact that the ballot form would include an incumbency designation until he received his absentee ballot in late August 1992; yet, that designation has appeared on every judicial election ballot on which a sitting judge has sought reelection since 1949.[8] Moreover, issues substantially similar to those raised herein were addressed and decided in 1950 in *Gustafson v. Holm*, 232 Minn. 118, 44 N.W.2d 443 (1950). Under those circumstances, we are not persuaded that petitioner, who allowed 48 days to elapse

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[6]Minn. Const. art. 1, §2 provides as follows:

> No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgement of his peers.

[7]*See also Marsh v. Holm*, 238 Minn. 25, 28, 55 N.W.2d 302, 304 (1952); *Moe v. Alsop*, 288 Minn. 323, 331, 180 N.W.2d 255, 260 (1970); *Parsons v. Hickey*, 294 Minn. 537, 539, 201 N.W.2d 150, 152 (1972).

[8]*See* Minn. Stat. §205.82 (1950); *Gustafson v. Holm*, 232 Minn. 118, 44 N.W.2d 443 (1950).

from the time of filing his affidavit of candidacy to the filing of his petition, acted with dispatch in asserting a challenge to legislation which has existed in various forms but in substantially similar design for over 40 years.

Nevertheless, because of the nature of these proceedings, we have chosen to address the merits of this broad challenge to the traditional judicial election process. Specifically, petitioner contends that the designation on the ballot by entitlement as the "(name of incumbent) seat," coupled with the descriptive word after the incumbent candidate's name, violates equal protection constitutional guarantees by creating and preserving to the incumbent an unfair advantage. Further, he urges the court to invalidate statutes which purport to treat judicial incumbent candidates differently from any other candidates for public office in the State of Minnesota. In our analysis of this focal issue, we take the opportunity to identify the historical underpinnings and to trace briefly the evolution of this judicial election process.

The methods by which the federal system and other states initially select and then elect or retain judges are varied, yet the explicit or implicit goal of the constitutional provisions and enabling legislation is the same: to create and maintain an independent judiciary, as free from political, economic and social pressure as possible so judges can decide cases without those influences. That that goal guided the framers of the federal constitution to grant life tenure to judges is evidenced by the writings of Alexander Hamilton[9] which expressed his concern that life tenure would provide judges sufficient security to allow them to rule with their consciences and according to the constitution, rather than to bow to political notions. While the framers

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[9]For example, in The Federalist No. 78, at 484 (G.P. Putnam Ed. 1923),

"As nothing can contribute so much to its [the judiciary's] firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution and, in a great measure, as the citadel of the public justice and the public security."

of our state constitution have developed a system of selection and election quite different from that federal scheme, they too, designed a plan to recognize the uniqueness and independence of the state judiciary.

As early as 1857, those who attended the two separate state constitutional conventions[10] devoted considerable debate to the process by which the judiciary was to be selected and concluded that the now-recognized goal of distinguishing judicial elections from elections for other offices could best be accomplished by providing judges with 7-year terms.[11] In practical effect, because the length of term differed from that of other elective offices, judicial elections were held at times other than those routinely scheduled for those other offices. However, after 1883, when the term was reduced to 6 years,[12] the difficulties associated with partisan judicial elections became more evident. Thus, the selection debate resurfaced in significant respects in 1912 when the legislature enacted separate, nonpartisan ballot legislation;[13] in 1948 when a special constitutional convention composed of public and legislative members recommended wholesale revisions to the judicial article of the state constitution, detailing, among other practices dealing with regulation of the judiciary, a comprehensive scheme for elections

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[10] In Minnesota, there were two constitutional conventions, one held each by the republicans and by the democrats. The product of those separate meetings were two constitutional drafts which, through the process of compromise and negotiation, were consolidated and then submitted to the voters for ratification. *See, e.g.*, M.S.A. Const., *Territorial Existence & Constitutional Statehood*, at 151-52 (1976).

[11] Minn. Const. art. 6, §3 (1857) provides:
"The judges of the supreme court shall be elected by the electors of the state at large, and their term of office shall be seven years, and until their successors are elected and qualified."

[12] Amendment to art. 6, §3, proposed by 1883 Gen. Laws, ch. 3, and adopted at the general election of 1883; 1885 Gen. Laws, p. 2.

[13] 1912 Extra Session Laws, ch. 2.

when an incumbent is seeking reelection;[14] in the 1949 statutory

[14]While no constitutional amendments were approved in response to the committee's report, the proposals for new sections 9, 10, 12, and 13 of the judiciary article demonstrated the problems facing judges during the election process and proposed solutions.

Sec. 9. Terms of Office; Election, Vacancies; Re-election. *The term of office of all supreme court justices and all judges shall be six years and until their successors are qualified, and they shall be elected by the electors of the state, district, county, municipality, or other territory wherein they are to serve. Where more than one position on the same court is to be filled at an election and an incumbent is eligible to be a candidate to succeed himself, each candidate shall specify and the official ballot shall show, the position for which he is a candidate.*

The legislature may provide that a vacancy in the office of justice of the supreme court shall be filled by appointment by the governor from a list of three persons nominated by a non-partisan judicial commission created by law. A person so appointed shall serve until his successor is elected for a six-year term at the first general election held more than one year after the occurrence of the vacancy, and when a justice once has been elected and is a candidate for re-election for the next and succeeding terms, the vote shall be on the question whether he shall be continued in office.

Comment: A uniform term of office of six years is recommended for all judges.

The method of selection provided in the second sentence has been in successful operation in Ohio. Where several incumbents are running for re-election, each should stand or fall on the basis of his own record. The present system does not permit this since opposing candidates run against the field.

While judges in this state are now elected, the usual practice has been that judges first ascend the bench by appointment by the governor on a vacancy occurring. The voters, with some exceptions, have on succeeding elections returned the judges to the bench. The second paragraph of this proposed section authorizes the legislature to put this practice on a formal legal basis with the provision added that the governor shall make his appointment from recommendations received from a nonpartisan commission. This method of selection has been in operation in Missouri since 1941. The electorate there has twice approved it, once by adopting it as a constitutional amendment and again by refusing to repeal it. It is also in operation in California in modified form. It is the method of selection recommended by the American Bar Association. For a description of the plan and its successful operation in Missouri, see article by Justice Douglas of the Missouri Supreme Court entitled, "Missouri Plan Works Well in Actual Results" in 33 Am.Bar Assn.Jr. 1169 (1947). The plan has been modified here to become operative only when an appointed judge has once been chosen in competition with other candidates at a general election.

Sec. 10. Terms Extended. *When a justice or judge attains the age of 67 years during his term of office for which elected, such term is hereby extended until the date of his compulsory retirement under Section 12.*

Comment: The commission feels that when a judge is within three years of the retirement age, he should be permitted to continue in office without standing for reelection.

Sec. 12. Retirement. *Supreme court justices, district and probate court judges shall be retired upon reaching the age of 70 years. When the administrative council certifies to the governor that it appears that any such justice or judge*

amendments involving the forerunner of the statutory provisions here at issue;[15] again in the 1956 constitutional amendments to article 6, sections 8, 10 and 11;[16] and, finally, in 1972

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is so incapacitated as substantially to prevent him from performing his judicial duties, the governor shall appoint a commission of three persons to inquire into the circumstances. On their recommendation the governor may retire such justice or judge from office. Retirement allowances for a justice or judge retiring hereunder who has held judicial office continually for ten or more years immediately preceding his retirement shall be provided by law.

Comment: The source of this section is the recent constitution adopted in New Jersey. See its judiciary article, Section VI, subd. 3 and 5. New York also has a compulsory retirement age of 70 years. This age is also the most commonly accepted one in voluntary retirement plans.

Sec. 13. Appointment. *If the office of a justice or judge becomes vacant, except as otherwise provided by section 9, the governor shall appoint a qualified person to fill the vacancy to hold office until his successor is elected and qualified. This successor shall be elected at the first general election held more than one year after the occurrence of the vacancy and his term of office shall be six years and until his successor is qualified.*

Comment: This section increases the spread between appointment and the appointee's subsequent candidacy for election from 30 days to one year. The 30-day period, as provided in the present Section 10, has proved too short. Complications arise when a vacancy occurs after the primary election but more than 30 days prior to the final election. In addition, the short period does not give sufficient time to enable observation of the competence developed by the appointee prior to the election.

The provision that the election shall be for the full term of office incorporates the judicial interpretation given to the present provisions. *See, Enger v. Holm*, 213 Minn. 154; 6 N.W.(2) 101 (1942). Report of the Constitutional Commission of Minnesota, at 42-45 (1948).

[15]Minn. Stat. §205.82 (1950).

[16]Minn. Const. art. 6, §8 (1956) provides:

> The term of office of all judges shall be six years and until their successors are qualified, and they shall be elected in the manner provided by law by the electors of the state, district, county, municipality, or other territory wherein they are to serve.

Minn. Const. art. 6, §10 (1956) provides:

> The legislature may provide by law for retirement of all judges for the extension of the term of any judge who shall become eligible for retirement within three years after expiration of the term for which he is selected and for the removal of any judge who is incapacitated while in office.

Minn. Const. art. 6, §11 (1956) provides:

> Whenever there is a vacancy in the office of judge the governor shall appoint in the manner provided by law a qualified person to fill the vacancy, to hold office until his successor is elected and qualified. The successor shall be elected for a six year term at the next general election occurring more than one year after such appointment.

in a report in which a newly convened constitutional study commission subcommittee recommended the implementation of a "Missouri plan"[17] in addition to a change in the basic structure of the judiciary.

Reflected in the considerable memorials to the recurring debates is the common thread of both public and legislative recognition that judicial elections are unique in this state's comprehensive elective scheme, demonstrating the fact that the powers conferred on the judicial branch differ markedly from those exercised by the other two branches of government.

Article 6 of our constitution vests "[t]he judicial power of the state in a supreme court *** a court of appeals, a district court, and such other courts *** as the legislature may establish." To assure competence in the exercise of the judicial power, the constitution specifies that holders of a judicial office must be "learned in the law." Minn. Const. art. 6, §5. Implicit in this requirement is recognition that those elected as judges will be subject to the restrictive canons of conduct governing the profession of law.[18]

The need for a competent, impartial, and independent judiciary creates, however, certain tensions when the judicial office is an elective office, both in the election process itself and in the performance of the duties of the office. While getting elected may be a not unimportant prerequisite of holding public office, it was felt this prerequisite should not detract from the judicial function to decide cases free from political maneuvering and in

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[17]The Missouri plan has been simply defined as follows:

> Under this plan, when a vacancy in a judicial office occurs, a non-partisan judicial commission submits three names to the governor who appoints one of them to fill the vacancy. After holding office for a limited period, the name of the appointee is submitted to the electorate without a competing candidate on the question: "Shall Judge _____ be retained in office?" If a majority of the votes cast on the question are in the affirmative, the appointee remains in office for a new and full term. If the vote is in the negative, the process is repeated.

Pirsig, *The Proposed Amendment of the Judiciary Article of the Minnesota Constitution*, 40 Minn. L. Rev. 815, 838 (1956).

[18]*See* Code of Judicial Conduct, Canon 7 (1989).

accordance with the law, regardless whether a decision is, at the time, popular or unpopular. To assure a measure of fair-mindedness and impartiality, the legislature, in 1912, decreed that elections for judicial office be nonpartisan.

This tension inherent in the judicial election process was recognized in a committee report to the 1972 Constitutional Study Commission, which urged the adoption of a retention-type election for incumbent judges, commenting:

> The committee also believes that additional qualified lawyers will seek appointment to judicial office under such a method of selection. Under the present system, too many qualified and competent lawyers who are successful practitioners decline to be considered for fear they will give up their practice only to be defeated by a politician with a popular name at some future election.

Judicial Branch Committee Report, Minnesota Constitutional Study Commission, at 24-25 (1972). In its report, the committee testified to the difficulties facing judges who seek reelection and the restrictions placed upon their candidacy:

> No one debates the desirability of having judges responsive to the people. Nevertheless, the public finds it distasteful for judges to become embroiled in politics. They have no platform, they can make no promises, and they must remain completely uncommitted to other persons in politics or any other area of civic activity. It is unbecoming for judges to become so deeply immersed in civic matters that they may be disqualified to consider the merits of the controversial issues. The method of retention at election as proposed in Section 7 [as an amendment to art. 6, the judiciary article] would allow the public to reflect favorably or unfavorably on a judge's competence in office and, thus, retain ultimate control of the judiciary in the hands of the voting public.

Id.

While this state has opted for the election of judges and has declined to adopt a Missouri-type retention plan, it has provided

its own variation of the election process. Section 10 of the original judiciary article provided for the filling of a judicial vacancy, not by special election but by appointment of the governor, with an election to follow at the next annual election occurring more than 30 days after the vacancy happens. In 1972, this provision was amended to provide that an election to succeed the appointee be held "at the next general election occurring more than one year after the appointment."[19] It appears the extension of the time before an election for the office was, in the words of the 1972 subcommittee, "to allow the public to reflect favorably or unfavorably on a judge's competence in office," while, at the same time, "retain[ing] ultimate control of the judiciary in the hands of the voting public." To achieve this purpose, it appears that the legislature considered it appropriate for the ballot to inform the voters which candidate was seeking retention.

The foregoing brief constitutional history amply supports the legislative prerogative of distinguishing judicial elections in manner and form from those legislative and executive elections conducted in the traditional political, partisan sense. It is against this background that the incumbency designations on judicial ballots, enacted in 1949, must be examined. We reach, then, the question before us, namely, whether the distinctive legislative treatment given judicial ballots survives equal protection scrutiny.

The petitioner appears to proceed from the assumption that the level of equal protection scrutiny is an open question with regard to judicial elections. However, the concept of an application of something akin to the rational basis test to judicial election practices is neither new nor novel. While we did not identify it as such in *Gustafson v. Holm*, 232 Minn. 118, 44 N.W.2d 443 (1950), we essentially applied that same rational basis analysis in discussing the historical significance and vital-

[19]The commission determined to leave the power of judicial appointment in the hands of the governor, but added to the committee's recommendation a provision that the governor may fill judicial vacancies created by incumbents not filing for reelection.

ity of the alley system concept, by which each justice holds a separate office or seat, and in discussing the basis for allowing the designation of "incumbent" to identify a present justice seeking reelection.

In *Gustafson*, we stressed the fact that the purpose of these two separate identifications is informational, not to give the incumbent an advantage; the fact that in a particular election this designation may provide the incumbent with an advantage over other candidates does not necessarily invalidate the statute. We reasoned:

> Use of the word "incumbent" following the candidate's name, simply informs the voter of the person who presently holds the position. In assisting voters to cast their votes intelligently for offices unfamiliar to the average voter, it is only a matter of fairness that he be advised who the present judge is. If he then believes that the judge should be retained, he has the opportunity of expressing his opinion by his vote. If he feels that the present judge should be replaced, he has a like opportunity of so indicating his opinion. The underlying purpose of the legislation is to identify the candidate so that the voter will know whom he is voting for. In order to enable the electorate to know who candidates are, it is not always possible to treat all candidates with absolute equality.

232 Minn. at 126-27, 44 N.W.2d at 447.

The *Gustafson* decision did not specifically address the equal protection argument as raised by the petitioner here. However, all of the ingredients are found in the decision to compel its application to reach the conclusion that the statutory ballot form framework withstands scrutiny under our modern rational basis test. We therefore reaffirm our holding in *Gustafson* that Minn. Stat. §205.82 (1950), the predecessor of current Minn. Stat. §204B.36, subds. 4 and 5, does not contravene the equal protection guarantees of the state constitution. A logical extension

and application of the "separate seat" concept of a judicial office is that the legislature is authorized to select a manner of identification of that seat which promotes and clarifies the distinction between the separate offices. Similarly, that same "incumbency analysis" supports a conclusion that the continued use of the term "incumbent" to denote the person who presently holds the office for purposes of informing the voter is no less valid today than it was in 1950. We noted in *Gustafson*, the designation is—

> intended for the benefit of the voter, not the candidate. Even though the candidate indirectly may derive some benefit from such identification, it does not follow that the legislation is unconstitutional.

232 Minn. at 127-128, 44 N.W.2d at 448. *See also Dougherty v. Holm*, 232 Minn. 68, 44 N.W.2d 83 (1950).

In *Ulland v. Growe*, 262 N.W.2d 412 (Minn. 1978) *cert. denied. sub nom. Berg v. Growe*, 436 U.S. 927, 98 S.Ct. 2822, 56 L.Ed.2d 770 (1978), the constitutionality of a statute governing ballot placement of candidates for legislative or executive partisan office was challenged by plaintiff, who as an independent candidate pointed out that he would never have his name appear first on the ballot. This court held that the ballot classifications were not without a rational basis and, this being so, it was not this court's role to interfere. We quoted with approval from *Clough v. Guzzi*, 416 F.Supp. 1057, 1068 (D.Mass. 1976):

> The fact that some statistical advantage may at the same time accrue to one of the candidates by virtue of his or her incumbency does not for constitutional purposes invalidate that otherwise legitimate purpose, especially where that advantage remains problematic and variable from election to election. And whether for purposes of a more absolute fairness that advantage warrants a different statutory scheme is properly a legislative consideration.

262 N.W.2d at 418.

Recognizing the quite different role the judicial branch plays in our government, the legislature has historically treated judicial election ballots differently from ballots for other elective offices. The reason for this different treatment is evident from the history of the judiciary article in our constitution, its statutory implementation over the years, and past judicial precedent. Whatever advantage there may be to the incumbent from the incumbency designation on the ballot, it is clear that the overriding purpose of the ballot designation has been to assure an able, independent and stable judiciary while at the same time requiring incumbent judges to submit to voter appraisal in an open election. These are legitimate considerations which satisfy the equal protection clause of our state constitution as well as the federal constitution.

The task of the voter in considering candidates for judicial office is a difficult one, made more difficult by the nature of the office itself—a position that requires its holder to studiously avoid partisan politics, to refrain from all discussions of public issues and to restrict one's membership and participation in organizations to those primarily of a professional nature. The incumbency designation is but one means by which the voter can be informed that the individual seeking reelection offers to the voters as a qualification for candidacy that fact of present judicial service.

It seems clear that Minnesota has adopted its own middle-of-the-road approach to judicial selection. The open election process has been retained, but with a quasi-retention feature which simply informs the voter, without comment, who is the incumbent candidate whose performance is under review and who is the non-incumbent challenger. This arrangement acts as a check on the gubernatorial appointment process by keeping the ultimate choice with the voters, while at the same time recognizing the unique independent nature of the judicial function.

This approach is authorized by our constitution as it has developed over the years, and its features, as we have demonstrated and previously held, do not violate the equal protection process of either the federal or state constitution.

Petition denied.

KEITH, C.J., and TOMLJANOVICH and GARDEBRING, JJ., took no part in the consideration or decision of this matter.

(Case as appeared in Advance Sheet for North Western Reporter.)

STATE OF MINNESOTA
IN SUPREME COURT

ROGER A. PETERSON,

Petitioner,

vs.

R.H. STAFFORD, Washington
County Auditor,

and

JOAN ANDERSON GROWE,
Secretary of State,

Respondents.

PETITION FILED PURSUANT TO MINNESOTA STATUTE 204B.44

TO: The Supreme Court of the State of Minnesota:

COMES NOW PETITIONER, Roger A. Peterson, pursuant to Minn. Stat. §204B.44, and states and alleges as follows:

1. Petitioner is a citizen of the State of Minnesota, a registered voter of Washington County, Minnesota and an attorney licensed to practice law in the State of Minnesota. That he in all respects meets each and every requirement of the statutes and Constitution of the State of Minnesota to be a candidate for justice of the Supreme Court of Minnesota.

2. Respondent, R.H. Stafford is the County Auditor for Washington County, Minnesota. That Respondent Stafford is the Washington County official responsible for ensuring that the ballots are printed for the general election to be held November 3, 1992.

3. Respondent Joan Anderson Growe is the Secretary of State of the State of Minnesota.

4. That pursuant to Minnesota Constitution Article 6, 7 all judges are to be elected for six year terms. That the position of chief justice and the position of three associate justices are to be

filled by the general election to be held November 3, 1992. Petitioner, Roger A. Peterson, has filed to run for the position of associate justice of the Minnesota Supreme Court which is currently held by Justice Sandra Gardebring. No other candidate has filed for this position.

5. That Petitioner has obtained a Washington County absentee ballot for the primary election to be held on September 15, 1992 (see attached Exhibit A).

6. That said primary ballot, pursuant to Minn. Stat. §204B.36, subd. 4, lists the title of the two judicial offices in which more than two candidates have filed as the current justice's seat. That said primary ballot, pursuant to Minn. Stat. §204B.36, subd. 5, lists the word "Incumbent" after the name of the chief justice or associate justice who is a candidate to succeed again. The ballot appears as follows:

CHIEF JUSTICE
SUPREME COURT
(KEITH SEAT)
(VOTE FOR ONE)

ROSS A. PHELPS

MICHAEL C. DEMOSS

A.M. (SANDY) KEITH Incumbent

ASSOCIATE JUSTICE
SUPREME COURT
(YETKA SEAT)
(VOTE FOR ONE)

ALAN C. PAGE

EDWARD W. BEARSE

KEVIN JOHNSON

7. That upon information and belief, Petitioner believes that pursuant to Minn. Stat. §204B.36, subd. 4, the ballots for the general election will designate the position he has filed for as the seat belonging to the justice currently on the bench.

8. That upon information and belief, Petitioner believes that pursuant to Minn. Stat. §204B.36, subd. 5, the ballots for the general election will designate the justice against whom he has filed as "Incumbent".

9. Petitioner alleges that Minn. Stat. §204B.36, subd. 4 denies him, and all parties similarly situated, Equal Protection and Due Process guaranteed by the Fourteenth Amendment of the U.S. Constitution and Article 1, 2 of the Minnesota Constitution.

10. Petitioner alleges that Minn. Stat. §204B.36, subd. 5 denies him, and all parties similarly situated, Equal Protection and Due Process guaranteed by the Fourteenth Amendment of the U.S. Constitution and Article 1, 2 of the Minnesota Constitution.

11. Petitioner alleges that any designation of a position as the seat of the justice currently holding the position and identifying that justice as an incumbent provides an advantage to the justice over the challenger in violation of Minn. Stat. §204B.35, subd. 2 and the Minnesota Constitution.

12. Petitioner alleges that the designation of the contested position as a particular justice's seat and the designation of the current justice as "Incumbent" as required by Minn. Stat. §204B.36, subds. 4 and 5 do not in any way serve to clarify the position for election, because there is only one chief justice in Minnesota and because each candidate files for a specific associate justice seat and must designate the seat at the time of filing.

13. Petitioner alleges that the designation of the seat on the ballot as a particular justice's seat as required by Minn. Stat. §204B.36, subd. 4, connotes a possessory interest in the seat

and, without serving any purpose to the voter, provides that the name of the justice currently holding the seat appears twice on the ballot.

14. Petitioner alleges that Minn. Stat. §204B.36, subds. 4 and 5 are unconstitutional, in that the designation of the seat by the name of the justice and the designation of incumbency provides an advantage to the sitting justice in violation of the conduct of a fair election as required by the Minnesota and United States Constitutions and a violation of Minn. Stat. §204B.35, subd. 2.

15. Accordingly, Petitioner seeks an Order of this Court as follows:

(a) Declaring Minn. Stat. §204B.36, subd. 4 and Minn. Stat. §204B.36, subd. 5 to be unconstitutional.

(b) Ordering Respondent Growe to order all County Auditors in the State of Minnesota to strike from all ballots the designations specified in Minn. Stat. §204B.36, subds. 4 and 5.

(c) Such other relief as is just and appropriate.

This petition is based on the facts and law set forth herein, the attached Affidavit of Petitioner dated August 31, 1992 and a forthcoming brief citing additional authority and argument.

Dated this _____day of _____, 1992.

RESPECTFULLY SUBMITTED,
PETERSON, ENGBERG & PETERSON

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NONPARTISAN PRIMARY BALLOT

Hennepin County Minnesota

September 15, 1992

INSTRUCTIONS TO VOTERS
TO VOTE, COMPLETE THE ARROW POINTING TO
YOUR CHOICE LIKE THIS

COUNTY OFFICES

SUBURBAN REGIONAL
PARK COMMISSIONER
DISTRICT 3
FOUR YEAR TERM
(vote for one)

- John W. (Jack) Gausman
- Jason F.M. Moede
- Marcia Vesely Taubr

JUDICIAL OFFICES

CHIEF JUSTICE
SUPREME COURT
(KEITH SEAT)
(vote for one)

- A.M. (Sandy) Keith INCUMBENT
- Ross A. Phelps
- Michael C. Demoss

VOTE BOTH FRONT
AND BACK OF BALLOT

Ward _____ Precinct _____

_____
Judge

_____
Judge

STATE NONPARTISAN PRIMARY BALLOT

Hennepin County, Minnesota
September 15, 1992

INSTRUCTIONS TO VOTERS
TO VOTE, COMPLETE THE ARROW POINTING TO
YOUR CHOICE LIKE THIS

JUDICIAL OFFICES

ASSOCIATE JUSTICE
SUPREME COURT
(YETKA SEAT)
(vote for one)

Kevin Johnson

Alan C. Page

Edward W. Bearse

92-1488

No. _____

Supreme Court, U.S.
FILED
MAR 02 1993
OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1992

ROGER A. PETERSON,

Petitioner,

vs.

R. H. STAFFORD,
THE WASHINGTON COUNTY AUDITOR,

Respondent,

and

JOAN ANDERSON GROWE, SECRETARY OF STATE
OF THE STATE OF MINNESOTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

BRIEF OF MINNESOTA CIVIL LIBERTIES UNION FOUNDATION AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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Minn. Stat. Sec.204D.08, subd. 3(1992). 16

CONSENT OF PARTIES

All parties to this case have consented in writing to the filing of this brief of Amicus Curiae, the Minnesota Civil Liberties Union. Their letters of consent accompany this brief pursuant to the Supreme Court Rule 37.2.

INTEREST OF THE AMICUS CURIAE

The Minnesota Civil Liberties Union (MCLU) is a private, non-profit, non-partisan, membership supported organization having more than 6,500 members in the state of Minnesota. The MCLU is a state-wide affiliate of the American Civil Liberties Union. Its purpose is the protection of the rights and liberties preserved by the Minnesota

and United States Constitutions. Among these rights is the fundamental right to vote free from unconstitutional state infringement. The MCLU has been active in defence of this right against laws that diminish the right to fair and impartial elections.

SUMMARY OF ARGUMENT

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." Westberry v. Sanders, 376 U.S. 1, 17 (1964). Because of their central role in interpreting and applying the laws, the individuals who sit on the courts are an integral part of our republican form of government. Where the

method of selection of the highest judicial officers is by popular election, as in Minnesota, that same "precious" right is the prerequisite of democracy. Voting rights are "preservative of other basic civil and political rights." Reynolds v. Sims, 377 U.S. 533, 562 (1964).

The constitutional right to be protected is that of "likeminded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences." Norman v. Reed, 502 U.S.___,___, 116 L.Ed.2d 711, 723 (1992)(citations omitted). In order for this right of access to be meaningful, infringements on the right require the "demonstration of a corresponding interest sufficiently weighty to justify the limitation, Id., and, "any severe

restriction [is] to be narrowly drawn to advance a state interest of compelling importance." Id. This follows the long tradition of our constitutional jurisprudence requiring strict scrutiny in cases involving one of the basic civil rights of humanity. Skinner v. State of Oklahoma, 316 U.S. 535 (1942).

The State of Minnesota has a unique election scheme for justices of its supreme court. For example, in this case where Associate Justice Gardebring was vying against the challenge of Petitioner Roger A. Peterson, the ballot read:

JUDICIAL OFFICES

ASSOCIATE JUSTICE
SUPREME COURT
(GARDEBRING SEAT)
(VOTE FOR ONE)

SANDRA GARDEBRING
INCUMBENT

ROGER A. PETERSON

The statute which mandates this

format is Minn. Stat. § 204B.36, subds. 4 and 5. They read as follows:

> The official ballot shall contain the names of all candidates for each judicial office and shall state the number of those candidates for whom a voter may vote. The title of each judicial office shall be printed on the official primary and general election ballot as follows: (a) In the case of the supreme court: "Chief justice (or associate justice) - supreme court (last name of incumbent) seat."

Minn. Stat. Sec. 204B.36, subd. 4.

> If a chief justice, associate justice or judge is a candidate to succeed again, the word "incumbent" shall be printed after that judge's name as a candidate.

Minn. Stat. Sec. 204B.36, subd. 5.

The Minnesota Court has applied "something akin to the rational basis test". Peterson v. Stafford, 490 N.W.2d at 423. This is the wrong standard both based on precedent in this Court[1] and on

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[1] *See, for example,* Anderson v. Celebrezze, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) and Norman v. Reed, 560 U.S. ___, 112 S.Ct ___, 116 L.Ed.2d 711, 723 (1992).

a basic constitutional tenant, that although in our federal system states retain the power to regulate their own elections, that power is not absolute.[2]

The current Minnesota scheme is more historical accident than a result of the legislature's reasoning. In 1949, Minnesota began designating the incumbent in judicial elections. Peterson v.

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[2]Minnesota need not opt for an elected judiciary, but could appoint the members or possibly even draw lots for the seats. The fact that Minnesota has selected judicial elections guarantees them the due process of the laws in the manner in which those elections are held, as well as the equal protection and associational voting rights established by the federal constitution. When they opted for the democratic process, the United States Constitutional requires that no voter by treated favorably at the expense of other voters. See, eg. Baker V. Carr, 369 U.S. 186 (1962) and Reynolds v. Sims, 377 U.S. 533 (1964).

Allowing slanting of elections by manifestly unfair ballot manipulation would destroy apportionment guarantees established by Baker and Reynolds.

Stafford, 490 N.W.2d at 423. In an attempt to merge the benefits of retention-type ballots of other states with the public's right to "retain ultimate control of the judiciary," "[t]he legislature considered it appropriate for the ballot to inform the voters which candidate was seeking retention." Id. Historical accident, this Court has stated, may be an explanation, but it is not a justification. Norman v. Reed, 116 L.Ed.2d at 726-27 Note 10 (citations omitted).

The Minnesota Supreme Court has acknowledged that the statutory provisions in question may have a discriminatory impact on voters supporting non-incumbents. Gustafson v. Holm, 232 Minn. 118, 128, 44 N.W.2d 443,

___ (1950).[3] This advantage to an incumbent's supporters results in a benefit to that justice: An appearance of state endorsement. At least one federal court has been upheld by a circuit court when it found as a matter of fact that even the listing of incumbents first without any other identifications, amounted to "an advantage of at least five (5) percent." McLain v. Meier, 637 F.2d 1159, 1166

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[3]"Even though the candidate indirectly may derive some benefit from such identification...." Gustafson v. Holm, 232 Minn. 118, 128, 44 N.W..2d 443 (1950). And "[T]his designation may provide the incumbent with an advantage over other candidates...." Peterson v. Stafford, 490 N.W.2d 418, 423 (1992). "Whatever advantage there may be to the incumbent from the incumbency designation on the ballot...." Id., at 424. "'The fact that some statistical advantage may at the same time accrue to one of the candidates by virtue of his or her incumbency....'" Id., *quoting* Clough v. Guzzi, 416 F.Supp. 1057, 1068 (D.Mass. 1976).

(1980).[4]

It also appears to be the *intent* of the Minnesota legislation to implement a "retention-plan", yet have it masquerade as a popular election. Had Minnesota opted for a retention election, the voters would at least know that the

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[4]*See also,* the following cases cited in McLain, 637 F.2d at 1166-67: Weisberg v. Powell, 417 F.2d 388, 392-93 (7th Cir. 1969); Culliton v. Bd. of Election Comm'rs of the County of DuPage, 419 F.Supp. 126 (N.D.Ill. 1976), *aff'd in part and remanded in part sub nom. Sangmeister v. Woodard,* 565 F.2d 460 (7th Cir. 1977), *cert. denied and app. dismissed sub nom. Illinois State Bd. of Elections v. Sangmeister,* 435 U.S. 939, 98 S.Ct. 1516, 55 L.Ed.2d 535 (1978); Gould v. Grubb, 14 Cal.3d 661, 122 Cal.Rptr. 377, 536 P.2d 1337 (1975); Holtsman v. Power, 313 N.Y.S.2d 904, 62 Misc.2d 1020, *aff'd mem.*, 34 App. Div.2d 917, 311 N.Y.S.2d 824, *aff'd mem.*, 27 N.Y.2d 628, 313 N.Y.S.2d 760, 261 N.E.2d 666 (1970); Kautenburger v. Jackson, 85 Ariz. 128, 333 P.2d 293 (1958); Elliot v. Secretary of State, 295 Mich. 245, 294 N.W. 171 (1940).

election is for retention.[5] Current "elections" are a confusing hybrid with none of the advantages of open elections or retention systems. An open election would fairly offer the candidates to voters. A retention election would allow evaluation by voters of the incumbent's performance in office, followed if necessary by a fair and open election or the political process of appointment. The judicial election process is of profound importance in Minnesota, where governors appoint judges without the "Advice and Consent" of a legislative body, as required by the United States Constitution. While Minnesota describes its scheme as merely "its own variation of the election process", Id., that

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[5]The Minnesota constitution requires an "open election" for judges. Peterson v. Stafford, 490 N.W.2d at 424.

"variation" deviates from minimum guarantees of the first and fourteenth amendments.

The intent to discriminate is further evident in the Minnesota Supreme Court's acknowledgement that the incumbency designation is a means of persuading the voters by listing it as a "qualification for candidacy." Id.,at 425. Minnesota judicial elections were made non-partisan in 1912 to avoid having party endorsements presented at the polling booth as qualifications. Id., at 422. Now there is only one endorsement for judicial office in Minnesota and that is for the incumbent, who's name is presented on the ballot in a manner that implies the incumbent candidate has the endorsement of the state.

This "comprehensive elective scheme,"Id., developed through

"distinctive legislative treatment" Id., at 423, has largely succeeded in depriving Minnesotans of a meaningful choice at the polling place when an incumbent judge is seeking re-election.

ARGUMENT

A presumption of validity generally favors legislation governing the structure of elections under circumstances where the fundamental right is not unduly burdened. This is because, under ordinary circumstances, election processes are "necessarily structured to maintain the integrity of the democratic system." Anderson v. Celebrezze, 460 U.S. 780, 788 (1985).[6] However, a

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[6]It has now become well established that election questions may be justiciable. See, eg. Baker v. Carr, 369 U.S. 186 (1962). But, the deference given

stricter scrutiny is applied to discriminatory burdens on the fundamental right:

> [A court] must consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the state as justifications for the burdens imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it must also consider this extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all of these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).[7]

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legislated procedural election controls implicitly recognizes that non-substantial interference with voting rights is but narrowly distinguishable from the political question.

5. The Seventh Circuit has articulated a standard of review for such ballot manipulation to fail judicial scrutiny if there is a showing of "intentional or

There is an inherent difficulty where a court, without review by any authority, examines the validity of its own justices' election against the standards of the United States Constitution. No state interests exists to justify the magnitude of the injury to

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purposeful discrimination by authorities" and actual harm to candidates. Bd. of Election Comm'rs v. Libertarian Party of Illinois, 591 F.2d 22, 24-25 (7th Cir), *cert. denied,* 442 U.S. 918, 99 S.Ct. 2840, 61 L.Ed.2d 285 (1979), *citing* Bohus v. Bd. of Election Comm'rs, 447 F.2d 821 (7th Cir. 1971) *and* Sangmeister v. Woodward, 565 F.2d 465 (7th Cir. 1977), *cert. denied and app. dismissed sub nom.* Illinois State Bd. of Elections v. Sangmeister, 435 U.S. 939, 98 S.Ct. 1516, 55 L.Ed.2d 535 (1978).

The intent element of this standard is satisfied both by clear inference from the foreseeable result of the combination of ballot position preference and the double designation as well as the Minnesota supreme court's prolonged discussion of, and reference to, the (unauthorized) advantages of retention elections. It is likely that the so-called "Missouri Plan" elections were never enacted in Minnesota because the citizens of Minnesota desired open elections.

voters' rights protected by the First and Fourteenth Amendments.

The remainder of this brief further illustrates the substantial nature of the burden on the fundamental rights of voters and candidates imposed by the Minnesota statute.

THE MINNESOTA INCUMBENCY DESIGNATIONS FOR ELECTIONS TO THE STATE SUPREME COURT VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

Incumbency designations are not utilized in elections for any non-judicial offices in Minnesota. In fact, the Minnesota legislature has explicitly recognized that "incumbency first" ballots give an unfair advantage to candidates in the top position. Minn.

Stat. Sec.204D.08, subd. 3(1992).[8] The Minnesota Supreme Court tacitly acknowledges the unfairness of the incumbency designations when it states that "whatever advantage there may be to the incumbent from the incumbency designation on the ballot, [the advantages are justified by the statute's interest in a] able, independent and stable judiciary". Peterson v. Stafford, 490 N.W.2d at 424.

The purpose of the statute, however, appears to be one more of entrenchment

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[8]Minn. Stat. Sec. 204D.08, subd. 3 (1992) requires rotating the names of the candidates on the ballot. No such remedial legislation acts to compensate for the effects of the incumbency designations or the denomination of the office as the justice's "seat" at the top of the ballot. See also, Gould v. Grubb, 536 P.2d 1337 (Calif. 1975)(incumbent first ballots violate the United States Constitution) and McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980)(incumbent party members in first column held unconstitutional).

and protectionism than the Minnesota Supreme Court acknowledges. This is evidenced by the Minnesota Supreme Court's statement that incumbency is a qualification relevant to judicial elections, Peterson v. Stafford, 490 N.W.2d at 425, and yet the Minnesota scheme provides no method for non-incumbents to list any of their qualifications on the ballot. The clear inference from the state's awareness of the unfair impact of the statute is an intent to endorse incumbent candidates with all the influence of the state, in the privacy of the polling place. This is discrimination and it limits political association without showing a compelling state interest.

In direct conflict with the constitutional interpretation of the Minnesota Supreme Court is the California

Supreme Court's declaration that no rational basis can exist for placing incumbents first on the ballot. Gould v. Grubb, 536 P.2d 1337 (Calif. 1975). The Gould court stated, "... the challenged provision effectively undermines the fundamental democratic election tenet of majority rule." Gould v. Grubb, 536 P.2d at 1343 (citations omitted).[9]

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[9]While courts such as McLain v. Meier and Gould v. Grubb have held incumbent designations and ballot placement advantages unconstitutional, this Court once affirmed a more limited incumbency designation alone in Binkowski v. Miller, 411 U.S. 901 (1973) (summary disposition).

Binkowski is, of course, because of its summary disposition, not precedent. Even the issue of incumbency designations alone has apparently not been fully briefed to this Court. In the instant case, there is also the combined effect of incumbency designations, listing first on each ballot the name of the incumbent, naming the "seat" for the incumbent, and using the incumbent's name twice on each ballot and the challenger's name just once. Further, Binkowski's incumbency designations were authorized by the Michigan constitution; the Minnesota constitution makes no such provision.

Similarly, the Arizona Supreme Court has found that even an alphabetical listing provides an unconstitutional advantage to the candidate appearing first on the ballot. Kautenburger v. Jackson, 85 Ariz. 128, 333 P.2d 293 (Az. 1958). By reaffirming the 1950 Gustafson decision, the Minnesota Supreme Court has found rationality where other states and federal courts could not.[10] Because of the conflicting holdings of circuit courts of appeal and state supreme courts

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This case provides the Court with a better opportunity to delineate the standards for this most vital of all areas of law in a democracy than did the 1973 Rinkowski case.

[10] McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980), Netsch v. Lewis, 344 F.Supp. 1280 (N.D.Ill. 1972), and Holtzman v. Power, 313 N.Y.S. 2d 904, 62 Misc.2d 1029, *aff'd mem.*, 34 App.Div.2d 628, 313 N.Y.S.2d 760, 261 N.E.2d 666 (1970).

Rule 10.1 (a) of this Court is applicable.

regarding incumbency first/incumbency endorsement ballots, guidance from this Court on the parameters of constitutional guarantees requires articulation.

DESIGNATION BY ENTITLEMENT OF THE JUDICIAL OFFICE OF CHIEF JUSTICE OR ASSOCIATE JUSTICE ON THE BALLOT AS THE "SEAT" OF THE INCUMBENT VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Assuming *arguendo* that the "stable" judiciary desired by those holding power in Minnesota may be achieved without offending the constitution by use of the incumbency designation, it is nevertheless made excessively, and unconstitutionally, "stable" by labeling the office with the name of the office holder.

This double advantage to the incumbent substantially interferes with voters' abilities to elect non-

incumbents. The Minnesota Supreme Court has implicitly recognized as much by stating that, "In assisting voters to cast their votes intelligently for offices unfamiliar to the average voter, it is only a matter of fairness that he be advised who the present judge is." Peterson v. Stafford, 490 N.W.2d at 423-24 *quoting* Gustafson v. Holm, 232 Minn. at 1265-27, 44 N.W.2d at 447. When offices are "unfamiliar to the average voter," there is no doubt further confusion of the electorates attendant to the double designation. If the *average* voter is unfamiliar with the judiciary and requires an incumbency designation, how much more unfamiliar the marginal voter must be; and it is the marginal voter who may make the difference in a

close election.[11] The Minnesota Supreme Court has as much as admitted that the elections are not even.[12]

The intention and effect of the Statute's disparate treatment is obviously to perpetuate incumbents and discriminate against voters supporting challengers. Exacerbating polling place confusion can only inure to the benefit of the incumbent.[13]

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[11]This effect has been noted by, among others, the Eighth Circuit as it applied to incumbent-first ballots in North Dakota. McLain v. Meier, 637 F.2d 1159, 1167 (8th Cir. 1980).

[12]See Note 2, *supra*.

[13]*Compare,* the statement from a district court opinion quoted by the Minnesota court that the "advantage remains problematic and variable from election to election." Slip op. at 15 *quoting,* Clough v. Guzzi, 416 F.Supp. 1057, 1068 (D.Mass. 1976). Presumably this reference indicates that the disadvantage may not be substantial in ALL elections, but it certainly IS substantial when the election is close.

THE MINNESOTA INTERESTS POSITED AS "JUSTIFICATIONS" FOR THE BALLOT DESIGNATIONS ARE INSUFFICIENT TO LEGITIMIZE THE CHARACTER AND MAGNITUDE OF THE BURDEN ON VOTERS' FIRST AND FOURTEENTH AMENDMENT RIGHTS.

The Minnesota Supreme Court premised its ruling on several bases as justifications for the statutes infringement on the Minnesota voters' Fourteenth Amendment rights.[14] They

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[14]The Minnesota Court offered these justifications in an analysis of the statute against only an equal protection challenge applying a mere rational basis analysis. As discussed above, this standard in inappropriate where the statute is challenged on the basis of an infringement of a fundamental right.

Furthermore, Minnesota apparently failed altogether to consider the First Amendment associational right (as applicable to the states through the fourteenth amendment's due process clause). In relying on its decision in Gustafson v. Holm, Minnesota has missed the development by this Court of associational rights as applied to voting rights that were, at the time of Gustafson, often assumed to be political questions without constitutional protection by the courts. Since Baker v. Carr, 369 U.S. 186 (1962), however, this

are as follows:

a. The denotion of a judicial office on the ballot as the incumbent's seat "promotes and clarifies the distinction between the separate offices." Peterson v. Stafford, 490 N.W.2d at 424.

This ground fails as it tends to obscure the fact that the challenger in an election, and her supporters, have an equal right to the judicial seat. To promote and clarify a distinction by blurring the boundaries between candidate and office manifests unreasonable and irrational expectations of the voters

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Court has made it clear that Equal Protection of suspect categories of people is not the only specific constitutional provision safeguarding our republican form of government. See, Norman v. Reed, 116 L.Ed.2d 711, 723 note 8. The right of political association encompasses equal protection, but equal protection does not encompass all of the rights guaranteed for political association.

(ie. to sort out in their minds that which has been muddled by the legislature). The double impediment to a fair election of naming the seat for the incumbent and the fact that the incumbents name is therefore always listed first has the purpose and effect of influencing the voter "at the most crucial stage in the electorial process - the instant before the vote is cast...." Anderson v Martin, 375 U.S. 399, 84 S.Ct. at 456 (1964).

Less restrictive means were available to the legislature, including numbering the seats, much in the way legislative districts are numbered. Furthermore, legislatures in other states have not found it "necessary" to identify judicial offices by the name of the incumbent. But, "Minnesota has adopted its own middle-of-the-road (sic) approach

to judicial selection" Id., an approach which, under the usual circumstances, makes the result of "elections" a foregone conclusion.[15]

b. "[T]he overriding purpose has been to assure an able, independent and stable judiciary while at the same time requiring incumbent judges to submit to voter appraisal in an open election." Peterson v. Stafford, 490 N.W.2d at 424.

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[15]Although case law in the election context is not as fully developed as that for equal protection and political association, fundamental procedural and substantive due process as well as candidates' supporters' privileges and immunities may be impaired where the government slants the entire election process. Cf. United States v. Cruikshank, 92 U.S. 542 (1876).

The Guarantee Clause of the United States Constitution, if it contains any positive law at all, must surely guarantee some level of fairness in elections mandated by the people in their state constitutions. Further, implicit in the constitutional provisions dealing with elections is the understanding that those elections will be free from undue governmental influence.

Here the Minnesota Court is referring to "the state's important regulatory interests (which) are generally sufficient to justify reasonable, non-discriminatory restrictions" Anderson v. Celebrezze, 460 U.S. 780, 788 (1983). However, in Anderson this Court stated some predicates, normally presumed but absent here. The restrictions must be evenhanded and protect the integrity and reliability of the electorial process. Anderson v. Celebrezze, 460 U.S. at 788-89 Note 8, 75 L.Ed.2d 547, 553 Note 7b. These regulations are not evenhanded towards the voters, as they tend to promote the interests of only those voters supporting the incumbent. Therefore, they detract from the integrity and reliability of the electoral process.

"Accepting the legitimacy of the interest claimed would not, however, excuse the requirement's unconstitutional breadth." Norman v. Reed, 711 L.Ed.2d at 726. Even if the abstract goals of an able, independent and stable judiciary can indeed be classified as "precise interests" capable of justifying some lessor intrusion on constitutional rights, Anderson v. Celebrezze, at 460 U.S. at 789, they cannot justify the character and magnitude of the injury to Minnesota voters. Perpetuation in office does not by itself produce "able" government; an "independent" judiciary does not compel a sacrifice to the democracy the judiciary is intended to serve; and, free and fair elections have been selected in the Minnesota constitution to be of more compelling interest than "stable" judges, secure in

high state offices.

In no event can such a double designation be deemed "necessary" when other jurisdictions avoid it. Further, the limits on participation by a class of voters is "especially difficult for the State to justify." Anderson v. Celebrezze, 460 U.S. at 793 (voters supporting independent candidates unconstitutionally denied equal ballot treatment). The limits on a class amplify the burden on the state so that the abstract interests, even if compelling in other contexts, could not justify the interference even if they were more focused in application--the scheme is simply too uneven.[16]

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[16]It is no coincidence that the recent election of the first minority member ever of the Minnesota Supreme Court, The Honorable Alan C. Page, was not running against an incumbent, but for the seat of a retiring associate justice.

The latitude extended to states to provide for the method of elections must still exist within the basic framework of the Federal Constitution. Just as a vote may be rendered meaningless by gerrymandering, so too may its effect be diluted by voting cues placed on ballots under color of law.

c. "[T]he purpose of these two separate identifications is informational, not to give the incumbent an advantage...," Peterson v. Stafford, 490 N.W.2d at 423, and "to identify the candidate so that the voter will know whom he is voting for." Id, at 424 quoting Gustafson v. Holm, 232 Minn. at 126-27, 44 N.W.2d at 447.

The "information" conveyed is that the candidates are unequally qualified. The incumbent is impliedly more qualified by virtue of her judicial experience

(even if the challenger had previous judicial or other relevant experience, that information is not conveyed to the voters).[17] The very seat contested is *named* after the incumbent. No information other than existence is conveyed on behalf of the non-incumbent candidate.

In a recent case which challenged an election procedure where party affiliation designations were permitted, but independent candidates received no designation, the Sixth Circuit characterized the unfairness as akin to,

> [A]n unlabeled product on a shelf

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[17]Incumbency designations communicate "as a qualification for candidacy that fact of present judicial service." Peterson v. Stafford, 490 N.W.2d at 425. It should be noted that a non-incumbent candidate may have present judicial service as a trial court judge or a member of the Court of Appeals, however, that information is not conveyed to the voters on the ballot.

> next to brand name products in a supermarket. Consumers would not chose the unlabeled product, because they have been conditioned by advertising to perceive quality in brand name products. Similarly, the absence of a label for a candidate gives rise to mistrust and negative inferences. Rosen v. Brown, 970 F.2d 169, 172-73 (6th Cir. 1992).

Certainly, the Minnesota method is broader than necessary to achieve mere informational goals.

The applicable standard was clearly articulated when the Court examined the Illinois election system last term in Norman v. Reed, 502 U.S. ___, 112 S.CT. 698, 116 L.Ed.2d 711 (1992). In that case, Illinois required gathering 25,000 votes for a party to be eligible to place its candidates on the ballot in separate political subdivisions. This Court

declared that even if the state interest[18] were accepted as legitimate, Illinois had not chosen the requisite MOST NARROWLY TAILORED MEANS OF ADVANCING THE INTEREST...." Id. 116 L.Ed.2d at 726 (emphasis added).[19]

The Minnesota Supreme Court admits that the incumbency designation alone is "but one means" of informing the voter of the added qualification of current judicial experience. Peterson v. Stafford, 490 N.W.2d at 425. One other

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[18]The state interest asserted was "ensuring that the electoral support for new parties in a multidistrict political subdivision extends to every district." Norman v. Reed, ___ U.S. ___, ___, 116 L.Ed.2d 711, 726 (1992).

[19]Norman also appears to place a requirement on the state to supply the Court with justifications for its substantial burdens on the rights of voters. Norman, 116 L.Ed.2d at 726 ("Reed has adduced no justification for the disparity here"). This brief addresses each justification posited by Minnesota.

method would be to use the incumbent's name as a description of the office. The Minnesota legislature has also selected this method. Either method serves a greater master--persuading, influencing, and pressuring a voter with state endorsement. The use of both schemes is intrinsically broader than necessary. It requires "elusive logic to demonstrate a serious state interest" Norman v. Reed, 116 L.Ed.2d 711, 726) in communicating the fact not once but twice.[20] If some voters do not understand that the "Gardebring Seat" indicates that Justice Gardebring holds that judicial office,

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[20]The Rosen court noted the affidavit of an expert in marketing and communications who stated that generally accepted communications and advertising principles recognize "substantial prejudice" in permitting designations for party candidates but not for independents. Rosen v. Brown, 970 F.2d 169, 172 (6th Cir. 1992).

how much more information can be imparted to those voters by designating the Justice as the "incumbent"?

d. "[T]o allow the public to reflect favorably or unfavorably on a judge's competence in office while, at the same time, 'retain(ing) ultimate control of the judiciary in the hands of the voting public.'" Peterson v. Stafford, 490 N.W.2d at 423

The Minnesota Supreme Court proffers this justification by quoting the judicial Branch Committee Report, Minnesota Constitutional Study Commission (1972), despite the fact that the Judicial Branch Committee's recommendations for adoption of a "Missouri Plan" were not enacted.

This goal is the goal of all elections, save those elections where the incumbent does not seek re-election. The goal is best served by open and fair

elections. Minnesotans have decided this by ratifying a state constitution which requires "incumbent judges to submit to voter appraisal in an open election." Peterson v. Stafford, 490 N.W.2d at 424.[21] The incumbency designation alone slants an election more than it provides reflection at the instant a ballot is cast. Bestowing a property interest on the incumbent at the top of each ballot actually *detracts* from these two goals by taking some control from informed voters who may, upon unfavorable reflection, desire to oust an incumbent. The task is made more difficult where uninformed voters are tilted, by double ballot designations presented at the

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[21]The Minnesota court is evidently interpreting its state constitution which requires that judges "shall be elected by the voters from the area which they are to serve in the manner provided by law." Minn. Const. Art. VI, Sec. 7.

ultimate moment of decision, in favor of incumbents.

For example, if two percent of voters cast their ballots for the incumbent solely because of the improper influence in the polling place, the challenger in a two person race must the muster the 50% plus one votes out of only 98% of the voters. This means that challenger must obtain votes from more than 51.02% of those not swayed by the double designation. If 5% of the voters cast their ballots for incumbents due to the double designation, the challenger must have over 52.632% of the remaining 95% of votes cast.[22] Note also that

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[22]This burden is analogous to the burden on Illinois voters held unconstitutional in Illinois Elections Board v. Socialist Workers Party, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979) and the increased signature requirements in subdivisions with separate districts in Norman v. Reed, 560 U.S.___, 112 S.Ct.

the Eighth Circuit has upheld a district court finding that "*at least* five (5) percent" differential results solely from listing the incumbent first. McLain v. Meier, 637 F.2d 1159, 1166 (8th Cir. 1980)(emphasis added). The non-arbitrary voting public thus has LESS control under the Minnesota scheme.

Finally, information about judicial candidates may be disseminated through more conventional political methods than by ballot manipulation.[23]

___, 116 L.Ed.2d 711 (1992).

[23]The Minnesota court believes the ethical constraints on judges prohibit fair dissemination of candidate information, and so the legislature has attempted to help the justices disseminate their qualification of judicial experience. Peterson v. Stafford, 490 N.W.2d at 425. However, the ethical constraints on judges also apply to judicial candidates, and the legislature has compensated only for the constraints on incumbents.

Canon 7 of the Code of Judicial

e. "[T]he explicit or implicit goal of the constitutional provisions and enabling legislation is the same--to create and maintain an independent judiciary, as free from political, economic and social pressure as possible to allow judges to decide cases without those influences." Peterson v. Stafford, 490 N.W.2d at 420.

Having stated this purpose, the Minnesota Supreme Court cites with much admiration The Federalist No. 78, praising permanency in office. Id. Although life-time appointments well serve the goal of independence in the federal judiciary, Minnesotans have selected an open election where ultimate control is purportedly vested in the hands of the voters. Circuitous methods of assuring judicial permanence under the guise of voter information are misguided at best and disingenuous at worst. The

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Conduct reads: "A.(1) A judge *or a candidate* for election to judicial office should not...."(emphasis added).

right of voters to have their candidate on a ballot will have no significance unless the ensuing election is meaningful. Or as Madison more cogently articulated it:

> If we avert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people. Annals of Congress. 3rd Congress (Nov. 27, 1794) 934.

However, without a measure of fairness, equality, and associational protection, the censorial power shifts to those who presently hold office.

The fact that some political economic and social pressure necessarily results from the existence of Minnesota's constitutionally mandated elections cannot justify slanting the process of those elections to alleviate those pressures as they effect incumbents. In this respect, judicial elections must

conform to the same levels of fairness as the elections for offices in the other branches. Escaping the political and social pressure of elections is an argument more suited to the robes of a king than to the robes of a judge.

Substantial impairment of fundamental voting, equal protection, and associational rights is not justified by the State's expounded logic. Even if the State's interests, articulated as abstract ideals, are held to be compelling, the method aimed at achieving those interests is far broader than necessary to achieve them.

CONCLUSION

The Minnesota statute fails to satisfy the minimum standards of the United States Constitution. The statute

substantially impairs fundamental rights without compelling justification. Further, its methods are broader than necessary to achieve the State's purported interests. Amicus therefore respectfully asks the Petition for Certioari be granted.

Dated March 2, 1993.

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No. 92-1488

In The

Supreme Court of the United States

October Term, 1992

ROGER A. PETERSON,

Petitioner,

vs.

R. H. STAFFORD, WASHINGTON COUNTY AUDITOR, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Minnesota

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Do the designations required by Minn. Stat. § 204B.36, subds. 4 and 5 (1992), to be stated on the ballot in a judicial election, which inform the voters of the name of the person who currently fills that judicial office, violate the equal protection guarantee of the Fourteenth Amendment to the United States Constitution?

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No. 92-1488

In The

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October Term, 1992

ROGER A. PETERSON,

Petitioner,

vs.

R. H. STAFFORD, WASHINGTON COUNTY AUDITOR, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Minnesota

BRIEF IN OPPOSITION

The respondents Joan Growe, Secretary of State of the State of Minnesota, and Washington County Auditor R.H. Stafford respectfully request that this Court deny the Petition for Writ of Certiorari (hereinafter "Pet.") seeking review of the decision of the Supreme Court of Minnesota in this case. The opinion of the Minnesota Supreme Court is reported at 490 N.W.2d 418 and is reproduced in the appendix to the petition (hereinafter "Pet. App.") at page 3A.

STATEMENT OF THE CASE

On July 21, 1992, Roger A. Peterson filed for candidacy to the office of Associate Justice of the Minnesota Supreme Court, seeking the seat held by Justice Sandra Gardebring. Pet. at 6. A person who files as a candidate for the office of Associate Justice of the Minnesota Supreme Court must state in his or her affidavit of candidacy the office of the particular justice or judge for which the individual is a candidate. Minn. Stat. § 204B.06, subd. 6 (1992). Each justice of the Minnesota Supreme Court is "deemed to hold a separate nonpartisan office." *Id.* The ballots for the primary and general elections for positions on the Minnesota Supreme Court are required by Minn. Stat. § 204B.36, subd. 4 (1992) to be printed with the title of the office as follows.

(a) In the case of the supreme court:

"Chief justice (or associate justice) – supreme court (last name of incumbent) seat."

In addition Minn. Stat. § 204B.36, subd. 5 (1992) provides: "If a chief justice, associate justice, or judge is a candidate to succeed again, the word 'incumbent' shall be printed after that judge's name as a candidate."

Pursuant to Minn. Stat. § 204D.14 (1992), in a nonpartisan election the names of candidates must be rotated with the names of the other candidates for election to the office so that the name of each candidate appears substantially an equal number of times at the top, at the bottom, and at each intermediate place in that group of candidates. *See* Minn. Stat. § 204D.08, subd. 3 (1992). To comply with the rotation requirement in an election with only two candidates, as in the present case, two different

styles of ballots were printed,[1] one style listing Peterson first in order and the other listing him second, as follows:

Style 1

ASSOCIATE JUSTICE
SUPREME COURT
(GARDEBRING SEAT)
(VOTE FOR ONE)

_____

ROGER A. PETERSON

_____

SANDRA S. GARDEBRING Incumbent

_____

Style 2

ASSOCIATE JUSTICE
SUPREME COURT
(GARDEBRING SEAT)
(VOTE FOR ONE)

_____

SANDRA S. GARDEBRING Incumbent

_____

ROGER A. PETERSON

_____

[1] Because the election occurred after the Minnesota Supreme Court's decision in this case, the actual printed ballots used in the election are not in the record. Peterson acknowledges the rotation requirement, Pet. at 23 n.4, 26, and does not dispute the fact that the ballots were printed and distributed in accordance with all statutory requirements.

Id. These two different styles of ballots were required to be distributed in such a way that half the voters received one style of ballot and half the voters received the other style, thus minimizing any perceived advantage that one candidate would have over the other as a result of appearing first on the ballot. Affidavit of Secretary of State Joan Growe, ¶ 4.

Prior to the election, on September 1, 1992, Peterson filed with the Minnesota Supreme Court his Petition Filed Pursuant to Minnesota Statute § 204B.44. Pet. App. at 18A. Peterson alleged in the petition that the designations required by Minn. Stat. § 204B.36, subds. 4 and 5 (1992), deny him and all other parties similarly situated equal protection and due process in violation of the United States and Minnesota Constitutions. At no time during the proceedings before the Minnesota Supreme Court did Peterson attempt to introduce evidence demonstrating that the challenged statutes have an impact on judicial elections by providing an advantage to incumbents. Although Peterson repeatedly asserts that the challenged statutes provide advantages to incumbents which make it "virtually impossible" for a non-incumbent to prevail in a judicial election, Pet. at 15, 16, there is not a shred of evidence in the record even attempting to show that it is "virtually impossible" to unseat an incumbent in a judicial election in Minnesota.

In its decision dated October 9, 1992, the Minnesota Supreme Court rejected Peterson's claims, holding that the statutes satisfied the Equal Protection Clauses of both

the state and federal constitutions.[2] *Peterson v. Stafford*, 490 N.W.2d 418, 424 (Minn. 1992), Pet. App. at 16A.

The election was held in November, 1992. Pet. at 2. Associate Justice Gardebring was re-elected.

REASONS FOR DENYING THE PETITION

A petition for certiorari is granted by this Court "only when there are special and important reasons therefore." Sup. Ct. R. 10.1. Review may be granted when a state court has decided a federal question in a way that conflicts with decisions of this Court or other courts or when a state court has decided an "important question of federal law which has not been, but should be, settled by this Court." *Id.* This case, however, does not meet these standards and, therefore, the petition should be denied.

I. THE MINNESOTA SUPREME COURT'S DECISION IS CONSISTENT WITH DECISIONS OF THIS COURT AND WITH OTHER COURT DECISIONS UPHOLDING SIMILAR STATUTES.

The Minnesota Supreme Court held that the ballot designations required by Minn. Stat. § 204B.36, subds. 4 and 5 (1992), do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. As demonstrated below, this decision is consistent with the well-understood principles of equal protection established by this

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[2] Because Peterson's due process claim was not addressed in Peterson's brief in the Minnesota Supreme Court, the claim was not addressed in the Minnesota Supreme Court's decision.

Court. The decision is also consistent with previous court decisions upholding the constitutionality of similar statutes.

A. THE MINNESOTA SUPREME COURT PROPERLY UPHELD THAT STATUTES UNDER THE RATIONAL BASIS TEST.

Peterson argues that the designation required by Minn. Stat. § 204B.36, subds. 4 and 5 (1992), violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[3] The Equal Protection Clause provides:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Despite the breadth of this language, this Court has recognized that a state is not required to treat all persons alike. *Tigner v. Texas*, 310 U.S. 141, 147 (1940). As this Court stated in *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985):

> Generally, a law will survive that scrutiny [under the Equal Protection Clause] if the distinction rationally furthers a legitimate state purpose.

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[3] There are references in the Petition and in the brief of the *amicus curiae* Minnesota Civil Liberties Union to infringement on the First Amendment right of voters. However, this case does not present a First Amendment issue to this Court. No First Amendment issue was raised in the Minnesota Supreme Court, nor was any First Amendment issue argued before or decided by the Minnesota Supreme Court.

However, if a law operates to the peculiar disadvantage of a suspect class or interferes with the exercise of a fundamental right, the law is subject to strict scrutiny, in which case the classification must further a compelling governmental interest which cannot be served by an alternative means less burdensome to the suspect class or fundamental right. *See Plyler v. Doe*, 457 U.S. 202, 217 (1982).[4] As the discussion below demonstrates, the Minnesota Supreme Court properly subjected the challenged statutes to the rational basis test, not to strict scrutiny. Peterson also raises for the first item in this case the issue of whether the Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), established a separate equal protection standard applicable only to challenges to state election laws and whether that standard should be applied here. Pet. at 16-17. As discussed below, the *Anderson* balancing test does not apply in this case.

1. The rational basis test is the proper standard in this case.

The Minnesota statutes challenged in this case merely apprise the voters of which of the seats on the state supreme court is being contested and which of the candidates is the incumbent. The statutes do not operate to the peculiar disadvantage of a suspect class or interfere with the exercise of a fundamental right. Although legislative enactments which directly infringe upon the exercise of

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[4] This Court has also applied an intermediate level of scrutiny to certain classifications, not relevant here, where the classification "gives rise to recurring constitutional difficulties, such as those based on alienage, gender, or illegitimacy." *Id.*

the political franchise are subject to "strict scrutiny" review, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966), not every law that imposes any burden upon the right to vote is subject to strict scrutiny. *Burdick v. Takushi*, ___ U.S. ___, 112 S.Ct. 2059, 2063 (1992). As this Court observed in *Burdick*, all election laws impose some burden upon individual voters, and to subject every voting regulation to strict scrutiny "would tie the hands of the States seeking to assure that elections are operated equitably and efficiently." *Id.*

There was no evidence before the Minnesota Supreme Court demonstrating that the challenged statutes in any way infringe upon the right to vote. Instead, the statutes relate to the manner in which candidates run for office. The Eighth Circuit has recently observed that "the right to run for office, unlike the right to vote, is not a fundamental right." *Stiles v. Hunt*, 912 F.2d 260, 265 (8th Cir. 1992), citing *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849 (1972).

The challenged statutes are not subject to strict scrutiny because they *do not* impose the type of restrictions on the fundamental right to vote that have been held by this Court to warrant strict scrutiny. They do not limit the right to vote to certain classes of persons, *Hill v. Stone*, 421 U.S. 289 (1975) (limiting voting in city bond elections to persons who pay property taxes in the city). They do not prevent a person from voting for different political parties within a certain time frame, *Kusper v. Pontikes*, 414 U.S. 51 (1973) (prohibiting a person from voting in the primary election of a political party if the person voted in the primary of another party within the preceding 23 months). They do not impose prohibitively burdensome

candidate filing fees, *Bullock v. Carter*, 405 U.S. 134 (1972). They do not restrict the ballot to candidates of only certain political parties, *Williams v. Rhodes*, 393 U.S. 23 (1968). They do not make payment of a fee a prerequisite to voting, *Harper v. Virginia Board of Elections*, 383 U.S. 664 (1966). They also do not involve suspect classes, as in *Anderson v. Martin*, 375 U.S. 399 (1964), where the candidate's race was required to be printed on the ballot. Thus the statutes are subject to the rational basis test under the Equal Protection Clause of the Fourteenth Amendment.[5]

The applicability of the rational basis test to the statutes here is supported by the decision in *Clough v. Guzzi*, 416 F.Supp. 1057 (D.Mass. 1976). In *Clough*, the challenged statutes provided that the incumbents' names would appear first on all ballots and that the names be followed by the designation "incumbent". The plaintiff alleged that the fundamental right to vote was being infringed by the statute. *Id.* at 1066. The court stated that in order to determine whether the statute was subject to strict scrutiny required "an examination 'in a realistic light' of the extent and nature of the impact of the questioned practice on the right to vote." *Id.* (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). The court rejected the plaintiff's argument that the challenged statute had the

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[5] Peterson cites *McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980), for the proposition that "the manipulation of the information provided on the ballot has an effect on the fundamental right to vote," Pet. at 14, thus implying that strict scrutiny was applied in that case to a ballot format statute. However, the Eighth Circuit did not apply strict scrutiny, noting that "most courts have applied the rational basis test" to ballot format statutes. 637 F.2d at 1167.

effect of providing incumbents such an unfair advantage, by giving them the windfall vote, that it diluted the weight of the vote of voters who support the class of non-incumbents. The court stated:

> [T]he dilution effect here depends upon the existence of a pool of presumably uninformed voters. Yet non-incumbents and their supporters have access to those voters and may, in theory and possibly in practice, so educate them as to eliminate the donkey vote and thus eliminate the statistical bias. Furthermore, the impact of the Massachusetts statutes on the total vote is not so clear that we can really define with anything approaching certainty . . . how significantly the state is directly affecting the weight of anyone's vote.

416 F. Supp. at 1067. The court concluded that, even assuming some positional advantage, the voters' right to choose among candidates was not sufficiently infringed as to warrant strict scrutiny. *Id.* Peterson also argues that the incumbency designations of Minn. Stat. § 204B.36, subds. 4 and 5 (1992) "dilute the weight of the votes of all the electors who cast their votes for non-incumbents." Pet. at 20. As in *Clough*, Peterson's dilution argument has no merit, and strict scrutiny is not applicable.

The applicability of the rational basis test to the statutes here is also supported by the decision in *Williamson v. Fortson*, 376 F. Supp. 1300 (N.D. Ga. 1974), which involved a Georgia statute that required the incumbency of a candidate seeking party nomination to be indicated on the ballot for the primary election. The court applied the rational basis test in scrutinizing the statute under the Equal Protection Clause.

The Minnesota Supreme Court's decision in this case is consistent with its previous decisions applying the rational basis test to ballot format statutes. In *Gustafson v. Holm*, 232 Minn. 68, 44 N.W.2d 443 (1950), the court upheld under the rational basis test the predecessor statute to Minn. Stat. § 204B.36, subds. 4 and 5 (1992), which required an incumbent designation on the ballot for a judge or a justice running for re-election. Also, in *Ulland v. Growe*, 262 N.W.2d 412 (Minn.), *cert. denied sub nom. Berg v. Growe*, 436 U.S. 927 (1978), the court refused to apply strict scrutiny to statutes which controlled the order in which candidates' names appeared on election ballots, requiring party-designated candidates to be listed before independent candidates. The Court specifically rejected the analysis of *Gould v. Grubb*, 536 P.2d 1337 (Cal. 1975) (applying strict scrutiny to a ballot position statute), upon which Peterson would have this Court rely. Pet. at 25. The challenged statutes were upheld under the rational basis test.

Because the designations required by Minn. Stat. § 204B.36, subds. 4 and 5 (1992), are no more burdensome on the exercise of right to vote than the statutes examined in *Clough, Williamson, Gustafson,* and *Ulland*, the Minnesota Supreme Court properly applied the rational basis test in this case.

2. The *Anderson* decision rested on First Amendment grounds and does not apply in this case.

Peterson has urged this Court to determine that, even if the Minnesota Supreme Court's rejection of the strict

scrutiny test was correct, the decision should be reviewed because the Minnesota Supreme Court should have applied the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1973).[6] Pet. at 16-17. By characterizing the *Anderson* test as an alternative to strict scrutiny, Peterson implies that this Court has established a separate equal protection standard that applies only to challenges to state election laws. This contention cannot be sustained.

Anderson involved an Ohio law which barred independent candidates from the ballot for President if they did not file a statement of candidacy by March of the election year. The Court found that his restriction "impinges, by its very nature, on associational choices protected by the First Amendment." *Id.* at 793. In striking down the law, the Court held:

> Under any realistic appraisal, the 'extent and nature' of the burdens Ohio has placed on the voters' freedom of choice and freedom of association, in an election of nationwide importance, unquestionably outweigh the State's minimal interest in imposing a March deadline.

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[6] The balancing test established in *Anderson* requires the court to 1) consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate; and 2) identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. The court must then consider the legitimacy and strength of those interests and the extent to which those interests make it necessary to burden the plaintiff's rights. Although the test itself mentions the Fourteenth Amendment, the case did not invalidate the statute on equal protection grounds.

Clearly, *Anderson* was a ballot access case which was not decided as an equal protection case and does not establish a test which replaces either the rational basis test or the strict scrutiny test in equal protection challenge.

Peterson has asked this Court to review the Minnesota Supreme Court's equal protection decision. The case was neither argued nor decided as a First Amendment case below, and Peterson does not raise the First Amendment in his statement of the issue. Pet. at i. Therefore the *Anderson* test has no applicability to this case.

B. Minn. Stat. § 204B.36, Subds. 4 and 5 (1992), Are Rationally Related To A Legitimate State Interest.

Under the rational basis test, this Court accords the legislative judgment a presumption of constitutionality. The Court has stated:

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, or decisions presume the constitutionality of the statutory discrimination and require only that the classification challenged be *rationally related to a legitimate state interest.*

New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (emphasis added). The elements of the rational basis test were recently restated in *Nordlinger v. Hahn*, ___ U.S. ___, 112 S.Ct. 2326, 2332 (1992), as follows:

> [T]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, [citation omitted] the legislative

> facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, [citation omitted], and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational [citation omitted].

As the discussion below amply demonstrates, Minn. Stat. § 204B.36, subds. 4 and 5 (1992), are constitutional under the rational basis test.

1. The incumbency designation required by Minn. Stat. § 204B.36, subd. 5 (1992), is supported by the rational basis test.

The incumbency designation required by Minn. Stat. § 204B.36, subd. 5 (1992), is rationally related to a legitimate state interest. As the Minnesota Supreme Court recognized in its decision in this case, "judicial elections are unique in this state's comprehensive elective scheme," due to the fact that "the powers conferred on the judicial branch differ markedly from those exercised by the other two branches of government." *Peterson*, 490 N.W.2d at 422; Pet. App. at 11A. Because the judiciary must remain independent and "as free from political, economic and social pressure as possible to allow judges to decide cases without those influences," *Peterson*, 490 N.W.2d at 420, Pet. App. at 7A, judicial officers running for re-election lack some of the advantages that other candidates for political office enjoy. As the Minnesota Supreme Court recognized almost 30 years ago in *Foley v. Donovan*, 274 Minn. 501, 503, 144 N.W.2d 600, 603 (1966):

> A great many of our voters are not personally acquainted with members of the judiciary, and particularly, with members of the supreme court. They run on a nonpartisan ticket without benefit of party, platform, or issues. They have little time for campaigning.

The present Minnesota Supreme Court also recognized the restraints imposed upon judicial candidates by the nature of the office itself, stating that it is "a position that requires its holder to studiously avoid partisan politics, to refrain from all discussions of public issues and to restrict one's membership and participation in organizations to those primarily of a professional nature." *Peterson*, 490 N.W.2d at 425, Pet. App. at 16A.

Given these disadvantages, the state has a legitimate interest in providing useful and precise information to the voters as to whether any of the candidates has filled the office previously. That way, the voters may make a more informed choice for an office with which they, with the probable exception of voters who are members of bar, are largely unfamiliar. In *Foley*, the Minnesota Supreme Court stated:

> Our election laws are bottomed on the theory that no candidate for an office ought to be given an unfair advantage over another and *the people ought to be permitted to know whom and what they are voting for.*

Id. (emphasis supplied).

The incumbency designation feature of Minn. Stat. § 204B.36, subds. 4 and 5 (1992), is further supported by a rational basis because, as the Minnesota Supreme Court noted, it is part of Minnesota's " 'middle-of-the-road'

approach to judicial selection." *Peterson*, 490 N.W.2d at 425, Pet. App. at 16A. While the election process gives the ultimate choice of judicial officers to the voters, the statutes serve as a quasi-retention feature by informing the voter who is the incumbent candidate whose performance is under review. *Id.* Thus there are plausible policy reasons for the classification created in Minn. Stat. § 204B.36, subds. 4 and 5 (1992), based on legislative facts which rationally may have been considered to be true by the Legislature.[7]

Minn. Stat. § 204B.36, subd. 5 (1992), also meets the last prong of the rational basis test because the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. Where, due to the nature of the office, there are likely to be a large number of uniformed voters, it is logical to identify the incumbent if the voters are to be permitted to know for or against whom they are voting. Thus the statutes here meet all of the tests of the federal rational basis test and were properly upheld under the Equal Protection Clause of the Fourteenth Amendment.

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[7] At pages 21-22 of the Petition, Peterson appears to argue that the legislative purposes underlying the challenged statutes violate Minn. Const. art. VI, § 7 and that the Minnesota Supreme Court interpreted that state constitutional provision too broadly when it upheld the challenged statutes. However, this Court has stated that "[o]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge *federal* rights." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977) (emphasis added) (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945)). Thus the consistency of the statute with the Minnesota Constitution cannot be brought before this Court.

The Minnesota Supreme Court's decision upholding the constitutionality of the incumbency designation is in harmony with other federal and state court decisions upholding incumbency designation statutes under the rational basis test.

The facts in the unreported decision summarily affirmed in *Binkowski v. Miller,* 411 U.S. 901, 93 S.Ct. 1530 (1973), are extremely similar to the facts in the instant case. *See* discussion in Maurice Kelman, Ballot Designations: A Second Look, 35 Wayne L. Rev. 63, 68-71 (1988). Binkowski, a local district judge, was a candidate for a county probate court seat, and his opponent received the benefit of the incumbent designations provided by the Michigan constitution. *Id.* at 69. The lower court's opinion was rendered in the form of unpublished remarks from the bench. *Id.* The court applied the rational basis test, stating:

> We find it to be a valid and compelling State objective to eliminate as much as possible the participation of judges in the political process. We find the judicial office sui generis, different from the executive and legislative office, and we find the State to have made an appropriate determination to give the people some voice in the selection but at the same time limit to some extent the extent of permissible participation by incumbent judicial officers, and that the determination to afford incumbent officers the designation of their office is reasonably related to this objective.

Id. Binkowski appealed to this Court, and the State Bar of Michigan moved to affirm, stating the issue as follows:

> Does the Equal Protection Clause of the Fourteenth Amendment prohibit the State of Michigan from utilizing a "hybrid" system for selecting its judiciary that combines the elective process with a method of incumbency designations rationally designed to minimize the participation of incumbent justices and judges in the political arena and provides some measure of judicial tenure and stability?

Id. at 70. As Professor Kelman states in his law review article: "The summary affirmance must be understood as a clear-cut repudiation of Binkowski's equal protection complaint." *Id.*

Although Peterson asserts that the *Binkowski* decision has *no* precedential value, Pet. at 27, this Court has recognized that a "summary affirmance . . . while having less precedential value than an opinion in an argued case, was nonetheless a ruling on the merits." *Southern Railway Co. v. Seaboard Milling Co.*, 442 U.S. 444, 462, 99 S.Ct. 2388, 2398 (1979).[8]

The Minnesota Supreme Court's decision is in harmony with the decision in *Williamson v. Fortson*, 376 F.Supp. 1300 (N.D. Ga. 1974), in which a statute required ballots for the primary election to indicate the incumbent among candidates for the Georgia House of Representatives. The court stated:

> The state has wide discretion to decide what information should be presented to the voters.

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[8] Peterson's attempt to distinguish this case, Pet. at 27, on the grounds that the Michigan Constitution specifically permitted an incumbency designation fails, since the Michigan Constitution is also subject to equal protection review by this Court.

> The court agrees with the plaintiff that it would be desirable for all voters to be well informed in making their electoral choices. The court cannot, however, agree that it is irrational for the state to attempt to provide some minimum quantum of information on which to base his choice among the candidates. The fact that this statute may not be the best possible method to achieve the state's objective is not sufficient to invalidate the statute under the rational basis test.

Id. at 1303. The court upheld the constitutionality of the statute.

In *Clough v. Guzzi*, 416 F.Supp. 1057 (D. Mass. 1976), a Massachusetts statute required ballots in primary and final elections to list incumbents first and to designate incumbents. The court had heard expert testimony from which it concluded: "[T]he advantage conferred by incumbency and by first position on the ballot is not one which is easily susceptible to measurement." *Id.* at 1065. The court found that "designation of incumbency does confer a distinct benefit on the incumbent candidate" but had difficulty clearly identifying the extent of any unequal treatment. *Id.* at 1065-66. The Commonwealth of Massachusetts asserted that the incumbency designation was an "informational device" which indicated "in a clear manner who is the candidate for re-election." *Id.* at 1068. The Commonwealth asserted that the most important decision the voter must make is whether to retain or replace the incumbent. The Commonwealth also asserted that "if there is an uninformed segment of the voters, those votes should go to the incumbent candidate who at least has some experience in the business of government." *Id.* The court stated:

> We cannot say that these are illegitimate considerations beyond the authority of the Commonwealth properly and lawfully to advance. The designation of incumbency is material, and the statutory order relevant, to the decision-making process. [Citations omitted.] The fact that some statistical advantage may at the same time accrue to one of the candidates by virtue of his or her incumbency does not for constitutional purposes invalidate that otherwise legitimate purpose, especially where that advantage remains problematic and variable from election to election.

Id. The court upheld the statute under the Equal Protection Clause of the Fourteenth Amendment.

Prior to the decision in this case, the Minnesota Supreme Court upheld incumbency designation requirements on judicial ballots in *Gustafson v. Holm*, 232 Minn. 68, 44 N.W.2d 443 (1950). In *Gustafson*, the petitioner challenged the constitutionality of the predecessor statute to Minn. Stat. § 204B.36, subds. 4 and 5 (1992). The 1949 law required that "if a justice or judge is a candidate to succeed himself, the word 'incumbent' shall be printed after his name where it appears among the names of the candidate for office." The court stated:

> Petitioner next contends that the act in question is unequal and partial legislation and that it gives the incumbent an undue advantage over other candidates. Indirectly this may be so, but that does not necessarily invalidate the act. Use of the word "incumbent" following the candidate's name simply informs the voter of the person who presently holds the position. In

> assisting voters to cast their votes intelligently, for offices unfamiliar to the average voter, it is only a matter of fairness that he be advised who the present judge is.

Id. at 126-27, 44 N.W.2d at 447. The court pointed out that, depending upon the attitude of the voter toward the incumbent, the designation of incumbency could result in either a positive or a negative vote:

> If [the voter] then believes that the judge should be retained, he has the opportunity of expressing his opinion by his vote. If he feels that the present judge should be replaced, he has a like opportunity of so indicating his opinion.

Id. The court identified the legitimate interest being pursued by the state and the impossibility of achieving perfect equality. The court stated:

> The underlying purpose of the legislation is to identify the candidate so that the voter will know whom he is voting for. In order to enable the electorate to know who candidates are, it is not always possible to treat all candidates with absolute equality.

Id. The court upheld the constitutionality of the statute.

Peterson cites only one case which it appears that a requirement for designation of incumbency was struck down: *Rees v. Layton*, 6 Cal.App.3d 815, 86 Cal. Rptr. 268 (Cal. Ct. App. 1970). This decision was considered by the court in *Williamson*, which found itself "in disagreement with the California appeals court that identification of incumbents on the ballots does not have the effect of providing information for the voters," 376 F.Supp. at

1302. The *Williamson* court did not follow *Rees*, nor should this Court.

Because the Minnesota Supreme Court's decision is consistent with the principles of equal protection announced by this Court and with the relevant precedents, the Court should deny the Petition.

2. The statutory requirement to indicate on the the ballot the name of the justice whose seat is up for election is supported by the rational basis test.

The requirement of Minn. Stat. § 204B.36, subd. 4 (1992), to indicate on the ballot the name of the justice whose seat is up for election is a natural outgrowth of the provisions of Minn. Stat. § 204B.06, subd. 6 (1992), which state that each justice of the Minnesota Supreme Court is "deemed to hold a separate nonpartisan office."[9] Without naming the justice whose seat is up for election, voters do not know what position they are voting for. As with the incumbency designation, it is legitimate for the state to inform voters as to what they are voting for, and this information is effective to provide that information. *Clough*, 416 F.Supp. at 1068; *Williamson*, 376 F.Supp. at 1302; *Gustafson*, 232 Minn. at 126-27, 44 N.W.2d at 447.

Peterson is in error in arguing that Minn. Stat. § 204B.36, subd. 4 (1992), is in effect an "incumbent first" statute like those struck down in the cases cited at page 24 of the Petition. First, the *physical* placement of the

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[9] The constitutionality of Minn. Stat. § 204B.06, subd. 6 (1992), was never at issue in this case.

justice's name is different than the placement of candidates' names in the "incumbent first" statutes. For example, in *McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980), the statute required the list of *candidates* to start out with the candidate from the party who received the most votes in the last congressional election. This meant that the voter looking at the list of names from which he or she must choose saw the incumbent's name at the top of the list of *candidates*. Minnesota's statutory scheme has carefully avoided the potential for positional advantage on ballots for the Minnesota Supreme Court by requiring that names on ballots be rotated. To comply with the rotation requirement of Minn. Stat. § 204D.14 (1992), in this case, two different styles of ballots were printed, one listing Peterson first and another listing Peterson second. See footnote 1, *supra*. These two different styles of ballots were distributed in such a way that half the voters received one style of ballot and half the voters received the other style, thus minimizing any advantage that one candidate would have had over the other as a result of appearing first on the ballot. *Id.* The listing of the officeholder's name in the space identifying the *office* up for election in no way encourages the capricious or indifferent voter (the so-called "donkey vote," *see McLain*, 637 F.2d at 1166) to cast a ballot for the officeholder by checking off whoever is at the top of the ballot.

Even if the designation required by Minn. Stat. § 204B.36, subd. 4 (1992), provides some advantage to incumbents, that advantage does not render the statute unconstitutional. The statute in *Clough v. Guzzi*, 416 F.Supp. 1057 (D. Mass. 1976), provided both for the "incumbent first" position and the designation of the

incumbent.[10] Despite the court's recognition of some advantage, though immeasurable and uncertain, accrued to incumbents from the requirements, the court upheld the statute as furthering a legitimate purpose of government.

In *Ulland v. Growe*, 262 N.W.2d 412 (Minn.), *cert. denied sub nom. Berg v. Growe*, 436 U.S. 927 (1978), the statute required names of party-designated candidates to precede those of independent candidates on partisan election ballots. The case proceeded on the factual assumption that the candidate occupying the first position on the ballot will receive a substantial number of "extra" votes from voters who are either uninformed or uninterested in the candidates. The statute was upheld under the rational basis test as a legitimate method "to assist partisan voters in locating their candidates on the ballot," 262 N.W.2d at 418, despite the assumption that some candidates received an advantage from ballot position. Thus, even if the challenged statute could be seen as

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[10] Other decisions inolving alleged "positional bias" in which the statutes were upheld against an equal protection challenge include *Bd. of Election Comm'rs v. Libertarian Party*, 591 F.2d 22 (7th Cir.), *cert. denied sub nom. Libertarian Party of Illinois v. Bd. of Election Comm'rs*, 442 U.S. 918 (1979) (established political parties placed in top ballot positions, new political parties placed below); *Bohus v. Bd. of Election Comm'rs*, 447 F.2d 821 (7th Cir. 1971) (Democratic candidate placed on top line of ballot); *Krasnoff v. Hardy*, 436 F. Supp. 304 (E.D. La. 1977) (candidates' names appeared on same horizontal plane); *Voltaggio v. Caputo*, 210 F. Supp. 337 (D.N.J. 1962), *app. dismissed as moot*, 371 U.S. 232 (1963) (political parties given first choice of position on ballot); *Salinger v. Jordan*, 395 P.2d 49 (Cal. 1964) (first ballot position given to incumbent).

an "incumbent first" statute, which it is not, the statute should be upheld.

Peterson asserts that *Gould v. Grubb*, 536 P.2d 1337 (Cal. 1975), which struck down an "incumbent first" statute, should be followed in this case. *Gould* is distinguishable from the instant case because, in addition to the fact that Minn. Stat. § 204B.36, subd. 4 (1992), is not an "incumbent first" statute, the California Supreme Court had before it a full evidentiary record that the California statute conferred a "significant advantage" to the candidate in the top ballot position. 536 P.2d at 1340. There was no such record before the Minnesota Supreme Court. In addition, the California Supreme Court applied strict scrutiny to the California statute. As previously discussed, that standard is not the appropriate standard to be used in this case.

Because Minn. Stat. § 204B.36, subd. 4 (1992), is supported by a rational basis, the statute does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and was properly being upheld by the Minnesota Supreme Court. The Petition should be denied.

II. THIS CASE DOES NOT PRESENT AN IMPORTANT FEDERAL QUESTION PERTAINING TO STATE ELECTION LAWS.

It is true that the right to vote is a fundamental right, *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), and that important federal questions pertaining to state election laws which impair those rights should be decided by this Court. However, the question of whether

states can require incumbency designations on ballots in elections where judges and Minnesota Supreme Court justices are running for re-election is not an important federal question. Neither is the question of whether a ballot for the Minnesota Supreme Court should be allowed to indicate the name of the justice whose seat is up for re-election. The reason is that these types of ballot requirements do not affect the free and unimpaired exercise of the right to vote to the degree that some other state election laws have done.

As discussed *supra* at 8-9, the challenged statutes do not present the potential for denial of access to the ballot, as did the state laws in *Bullock v. Carter*, 405 U.S. 134 (1972) (filing fees), and *Williams v. Rhodes*, 393 U.S. 23 (1968) (restricting the ballot to candidates of only certain political parties). They do not place any restrictions on voters themselves, as did the state laws in *Hill v. Stone*, 421 U.S. 289 (1975) (restricting voting to people who pay property taxes); *Kusper v. Pontikes*, 414 U.S. 51 (1973) (restricting voting for different political parties in different primary elections); and *Harper v. Virginia Bd. of Elections*, 383 U.S. 664 (1966) (poll tax). In fact, the challenged statutes do not place any restrictions on voting, but merely provide the voters with factual information.

This case also does not present any question of impairment of First Amendment freedoms. No First Amendment issue was raised in Peterson's petition filed with the Minnesota Supreme Court, *see* Pet. App. at 18A-21A, and no First Amendment issues were argued to or decided by the Minnesota Supreme Court. This issue was most likely not raised because it is difficult, if not

impossible, to see how providing information on the ballot impairs the voters' right to freedom of association.

Finally, Peterson argues that this Court should decide this case because Minn. Stat. § 204B.36, subd. 4. (1992), is an "incumbent first" statute, and some courts have struck down "incumbent first" statutes. *See* Pet. at 24. However, as discussed *supra* at 22-23, the challenged statute is not a true "incumbent first" statute, and thus this is not a true "incumbent first" case. All of the "incumbent first" cases involved ballots where the incumbent was listed first among the candidates to be voted for. Because of the statutory rotational requirement in Minnesota, non-incumbent judicial candidates are listed first in the list of candidates on half of the ballots.

Because this case does not present an important federal question pertaining to state election laws, this Court should deny the petition.

CONCLUSION

For the foregoing reasons, petition should be denied.

Dated: March 23, 1993

Respectfully submitted,

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Supreme Court, U.S.
FILED

No. 92-1488

In the
Supreme Court of the United States
October Term, 1992

ROGER A. PETERSON,
Petitioner,

v.

R.H. STAFFORD,
the Washington County Auditor,
Respondent,

and

JOAN ANDERSON GROWE,
the Secretary of State of the
State of Minnesota,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

REPLY BRIEF TO BRIEF IN OPPOSITION

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The Petitioner, Roger A. Peterson, respectfully submits this Reply Brief and requests that the Court grant his Petition for a Writ of Certiorari.

I.
REASONS FOR GRANTING THE WRIT

The Minnesota Supreme Court's decision in Peterson v. Stafford, 490 N.W.2d 418 (Minn. 1992), raised important federal questions: Whether a state statute that provides election ballot voting cues which benefit incumbent judicial candidates and thereby denies to challengers and voters their First Amendment rights of free speech and free association and denies them equal protection of the laws guaranteed by the Fourteenth Amendment, is unconstitutional. Or, viewed from a different perspective, whether a state legislature can in-

directly amend an article of the State Constitution which established federally protected rights of free speech, free association and the freedom to vote under the First and Fourteenth Amendments by passing special laws without submitting the question to a vote of the people. That court's decision conflicts with the decisions of other state courts of last resort and with decisions of some United States Courts of Appeal. Specifically, the Sixth Circuit, applying the Anderson balancing test, recently struck down as unconstitutional a similar provision regulating party designations on ballots. Rosen v. Brown, 970 F.2d 169 (6th Cir. 1992). The Fifth Circuit upheld a state statute restricting notation on the ballot of a candidate's party affiliation with an

"unrecognized" political party. Dart v. Brown, 717 F.2d 1491 (1983). And the Eighth Circuit struck down a North Dakota incumbent-first statute. McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980).

That there are significant differences of opinion among state and federal courts is clearly demonstrated by the numerous cases cited by Petitioner in his Petition at 24-25 nn. 5 and 6 and the cases cited by the State in its Brief in Opposition at 10-11. The Courts have not spoken with one voice regarding the constitutionality of providing advantages to one class of candidates for a position which burden the rights of other classes of candidates for the same position.

This court should grant the Petition in order to resolve the conflict among

the courts. The Minnesota Supreme Court has decided "an important question of federal law which has not been, but should be, settled by this Court...." Sup. Ct. R. 10.1(c).

II.

THE PETITIONER HAS PROPERLY RAISED THE FIRST AND FOURTEENTH AMENDMENT ISSUES

The challenged statutory provisions do not deny a candidate access to the ballot. However, the provisions miscast and manipulate the information provided on the ballot and the form in which the information is presented to the voters. This state manipulation directly influences the electorate's fundamental right to vote, McLain v. Meier, 637 F.2d 1159, 1167 (8th Cir. 1980), by suggesting that the voter should vote for the incumbent. Inclusion of the "incumbent" designation and the designation of the

seat as the "incumbent's seat" on the ballot infringes upon every candidate's right, guaranteed by the Equal Protection Clause of the Fourteenth Amendment to a free and fair election, in which all candidates are treated equally.

Mr. Peterson has emphasized in his Petition that the statutory provisions deny him and all those similarly situated, in addition to voters who support non-incumbent judicial candidates, equal protection of the laws. These rights are, of necessity, closely intertwined with the voters' and candidates' First Amendment rights of free speech and free association. Mr. Peterson's Petition thoroughly discusses these connected rights and this Court's decisions which have addressed these issues.

III.

THE ANDERSON BALANCING TEST MUST BE APPLIED IN THE ANALYSIS OF THIS CHALLENGE TO THE JUDICIAL ELECTION STATUTE.

In its analysis of Mr. Peterson's challenge to the judicial election statute, the Minnesota Supreme Court applied "something akin to the rational basis test." Peterson v. Stafford, 490 N.W.2d at 423. The proper test to apply, however, was enunciated by this Court in Anderson v. Celebrezze, 103 S.Ct. 1564 (1983). This Court stated that:

> [c]onstitutional challenges to specific provisions of a State's election laws...cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. (Citation omitted)...It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must

> not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Id. at 1570 (citations omitted).

This Court specifically stated that where a state election law is challenged as unconstitutional, the applicable standard is the balancing test set forth in Anderson v. Celebrezze. Id. This Court based its conclusions in Anderson directly on the First and Fourteenth Amendments and did not engage in a separate Equal Protection Clause analysis. The Court, however, relied upon the analysis in its previous election cases resting on the Equal Protection Clause of the Fourteenth Amendment. Id. at 1569 n.7.

Minnesota would restrict application of the Anderson balancing test to iden-

tical factual scenarios. However, this Court has emphasized that a court reviewing an election rights case must consider the asserted injury to the "rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." Id. at 1570. This view was recently adopted by the Sixth Circuit in Rosen v. Brown, 970 F.2d 169 (6th Cir. 1992), a case factually similar to the case at bar.

Rosen v. Brown, 970 F.2d 169 (6th Cir. 1992) arose from a challenge to an Ohio state law prohibiting the placement of the designation "Independent" below the name of a candidate on the general election ballot. The Sixth Circuit court applied the Anderson balancing test to the plaintiff's claims that the statute burdened the fundamental rights of free

speech and free association and denied him the equal protection of the law guaranteed by the Fourteenth Amendment. Id at 174. The court applied the test despite the fact that it was "not the usual ballot access case [in that the challenged statute] did not prevent [the plaintiff] from having his name on the general election ballot." Id. at 175. Nevertheless, the court found that as in the current matter, access to the ballot was effectively nullified and the rights of the plaintiff's supporters to "meaningfully vote and meaningfully associate" were denied by the state statute that provided the "voting cue". Id at 176. Minnesota Statute §204B.36, subds. 4 and 5, has a similar effect and should be struck down by this Court as unconstitutional.

IV.
APPLICATION OF THE ANDERSON TEST RENDERS MINN.STAT. §204B.36, SUBDS. 4 AND 5, UNCONSTITUTIONAL

The first step in the Anderson analysis is to consider the character and magnitude of the alleged injury to the Plaintiff's First and Fourteenth Amendment rights. Id. at 175. As Mr. Peterson stated in his Petition, he has brought his case both as a candidate and as a voter (Petition at 6). While this is not a typical ballot access case, the State has effectively nullified Mr. Peterson's access to the ballot by providing voting cues to the electorate at the moment they are about to cast their vote. "[A]ny restriction on ballot access by candidates necessarily burdens the rights of their supporters to some extent". Id at 176 (citation omitted)

(emphasis added).

The First Amendment protects the right to cast a meaningful vote and to associate meaningfully for the advancement of political beliefs. Id. at 176. Mr. Peterson has alleged that the ballot format and voting cues mandated by the state statutory provisions violate the Equal Protection Clause because they place unequal burdens on non-incumbent judicial candidates, provide a decided advantage for incumbent justices, and dilute the weight of the votes of all the electors who cast their votes for non-incumbents (Petition at 20).

No evidence or testimony was presented in this case because the statute under which Mr. Peterson brought his claims provides that the initial hearing be brought before the Minnesota Supreme

Court. Minn. Stat. §204B.44 (1992). The procedure is conducted in an expedited manner and, therefore, is not conducive to the presentation of testimony and evidence. Mr. Peterson did, however, cite in his brief to the Minnesota Supreme Court and in his Petition to this Court, numerous cases and studies which have recognized that ballot position and voting cues do, in fact, effect the outcome of elections. (Petition at 24 and 25, nn. 5 and 6). These cases and studies support Mr. Peterson's contention that the statute creates a burden that falls unequally on non-incumbent candidates and their supporters. This Court has found such a burden significantly impairs important constitutional rights. Anderson v. Celebrezze, 102 S.Ct. at 1572-1573.

In the next step this Court must determine the legitimacy and strength of the interests advanced by the State to justify the burden imposed by the statute. Rosen v. Brown, 970 F.2d at 176. The State has proposed two justifications for the statutes at issue: (a) the incumbency designation provides information to the voters regarding the qualifications of the incumbents (Brief in Opposition at 15); and (b) the identification of the seat by the name of the currently sitting justice provides information to the voters regarding which seat they are voting upon (Brief in Opposition at 22).

The candidate qualification information provided by the State relates only to incumbent candidates. Moreover, non-incumbent candidates are not permitted

to list any qualifications on the ballot (i.e. lawyer for 32 years or appellate court judge). "A State's claim that it is enhancing the ability of the citizens to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." Anderson v. Celebrezze, 103 S.Ct. at 1575.

In the case at bar, the designation of the seat as the incumbent's and the placement of that designation in the position heading above the names of all the candidates results in the incumbent's name appearing twice on the ballot. This creates a heavy burden on the rights of non-incumbent candidates and their supporters. The present legislation clearly does not provide a reasonable manner in which to achieve the State's interest in avoiding voter con-

fusion. Because the State provides a "voting cue" or "clue" to incumbent judicial candidates but excludes such "voting cues" to non-incumbent challengers, "[t]he resulting burden on voting and First Amendment associational rights [is] 'an invidious discrimination, in violation of the Equal Protection Clause'". Rosen v. Brown, 970 F.2d at 177, quoting Williams v. Rhodes, 89 S.Ct. 5, 12 (1968). This Court must determine that Minn. Stat. 204B.36, subds. 4 and 5 constitutes "invidious discrimination" and is, therefore, unconstitutional.

The final step in the Anderson balancing test is to "weigh all the factors and decide whether the challenged provision is unconstitutional". Id. at 177. Minn. Stat. §204B.36, subds. 4 and

5, burdens the First Amendment rights of free speech and free association and also burdens the right of voters to cast their votes effectively. Furthermore, the statute violates the Equal Protection Clause of the Fourteenth Amendment by placing "unequal burdens" on non-incumbent judicial candidates, and by giving incumbent candidates a decided advantage at the polls. Id. at 177-178. The reasons cited by the State for the incumbency designation and the designation of the position as the incumbent's seat do not justify the burden imposed on non-incumbent candidates. Therefore, this Court must find that Minn. Stat. §204B.36, subds. 4 and 5, are unconstitutional.

The State relies on four cases to support its contention that Minn. Stat.

§204B.36, subds. 4 and 5, are not unconstitutional. None of the courts in these cases applied the Anderson balancing test.[1]

In Ulland v. Growe, 262 N.W.2d 412 (Minn. 1978), the plaintiffs challenged on equal protection grounds the constitutionality of a Minnesota statute that required the names of party-designated candidates to precede the names of independent candidates on election ballots for partisan positions. The facts of Ulland are clearly not analogous to the

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[1]This Court announced the balancing test in 1983. All of the cases cited by the State were decided prior to that date. Ulland v. Growe, 262 N.W.2d 412 (Minn.), cert. denied sub nom Berg v. Growe, 436 U.S. 927 (1978), Clough v. Guzzi, 416 F.Supp. 1057 (D. Mass. 1976); Williamson v. Fortson, 376 F.Supp. 1300 (N.D. Ga. 1974); Gustafson v. Holm, 232 Minn. 68, 44 N.W.2d 443 (1950).

present facts. Evidence received by the trial court and accepted as true by the Supreme Court emphasized two significant points:

> (3) Because of the importance of party affiliation, the effect of positional bias is considerably more pronounced in non-partisan elections.
>
> (4) The magnitude of positional bias tends to vary in inverse proportion to the visibility of a particular election. The less important (for whatever reason) the election, the greater the effect of positional bias.

Id. at 415. The court stressed in numerous places in its opinion, that its analysis of the facts was influenced by the fact that the statute concerned regulation of partisan elections, and did not apply to non-partisan elections. Id. at 414 n.5, 416, 417, 418.

This Court is faced with statutorily provided voting cues for incumbent justices in low-visibility, non-partisan

elections. Under the Minnesota Supreme Court's reasoning in Ulland, the court would have viewed the greater effect of positional bias in non-partisan, low-visibility elections as burdening the rights of the candidates and voters to such a degree that the statute would have been rendered unconstitutional.

The court in Ulland based its decision on the decision in Clough v. Guzzi, 416 F.Supp. 1057 (D.Mass 1976). Id. at 417. The court in Clough v. Guzzi, as well as the courts in the earlier decisions of Williamson v. Fortson, 376 F.Supp. 1300 (N.D. Ga 1974) and Gustafson v. Holm, 232 Minn. 68, 44 N.W.2d 443 (1950), were concerned with voting cues provided in partisan elections. Since the facts in the previously cited cases are not analogous to the instant facts, and the

effect of voting cues in non-partisan elections are more pronounced, thereby creating a more significant burden on the rights of candidates and voters, the cases do not provide guidance in the analysis of the current facts.

V.
CONCLUSION

For the foregoing reasons, the Petition should be granted.

Dated: April 13, 1993

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